

VERBATIM ¹RECORD OF TRIAL ²

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

[REDACTED]

(Social Security Number)

PFC/E-3

(Rank)

Headquarters and

Headquarters Company,

United States Army Garrison

(Unit/Command Name)

U.S. Army

(Branch of Service)

Fort Myer, VA 22211

(Station or Ship)

By

GENERALCOURT-MARTIAL

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

Date or Dates of Trial:

23 February 2012, 15-16 March 2012, 24-26 April 2012, 6-8 June 2012, 25 June 2012, 16-19 July 2012, 28-30 August 2012, 2 October 2012, 12 October 2012, 17-18 October 2012, 7-8 November 2012, 27 November - 2 December 2012, 5-7 December 2012, 10-11 December 2012, 8-9 January 2013, 16 January 2013, 26 February - 1 March 2013, 8 March 2013, 10 April 2013, 7-8 May 2013, 21 May 2013, 3-5 June 2013, 10-12 June 2013, 17-18 June 2013, 25-28 June 2013, 1-2 July 2013, 8-10 July 2013, 15 July 2013, 18-19 July 2013, 25-26 July 2013, 28 July - 2 August 2013, 5-9 August 2013, 12-14 August 2013, 16 August 2013, and 19-21 August 2013.

¹ Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

² See inside back cover for instructions as to preparation and arrangement.

1 one was not done. I can't remember. But for the most part, I used
2 to get incident reports, you know, not just on him, but other people
3 when--when things would occur that's outside the normal or something
4 like that--or something like--for example, if a prisoner didn't feel
5 well and they called medical; that kind of thing. So, yes, you'd--
6 routinely incident reports would be written for anything that's
7 outside the norm, ma'am.

8 MJ: Any follow-up based on that from either side?

9 ATC[CPT VON ELTEN]: No, ma'am.

10 CDC[MR. COOMBS]: No, Your Honor.

11 [The witness was duly warned, permanently excused, and withdrew from
12 the courtroom.]

13 TC[MAJ FEIN]: Ma'am, the United States requests a 10 minute
14 recess and it will be ready to call Major Zelek.

15 MJ: All right, any objection?

16 CDC[MR. COOMBS]: No, Your Honor.

17 MJ: Court is in recess until 5 minutes to 1500 or 3 o'clock.

18 **[The Article 39(a) session recessed at 1447, 10 December 2012.]**

19 **[The Article 39(a) session was called to order at 1459, 10 December**
20 **2012.]**

21 MJ: This Article 39(a) session is called to order. Let the
22 record reflect all parties present when the court last recessed are
23 again present in court. Major Fein?

1 TC[MAJ FEIN]: Ma'am, the United States calls Major Timothy
2 Zelek.

3 MAJOR TIMOTHY ZELEK, U.S. Marines, was called as a witness for the
4 prosecution, was sworn, and testified as follows:

5 DIRECT EXAMINATION

6 Questions by the assistant trial counsel [CPT VON ELTEN]:

7 Q. And for the record, you are Major Timothy Zelek, stationed
8 at Quantico?

9 A. Yes.

10 Q. Good afternoon, Major Zelek. How long have you been a
11 Marine?

12 A. I'm been in the Marine Corps for 12 years this summer now.

13 Q. And what is your current duty title?

14 A. My current MOS for the Marine Corps is a 4407, I'm a--I'm
15 in--I'm a civilian personnel attorney for Marine Corps Base Quantico.

16 Q. What do you do as a civilian personnel attorney?

17 A. Primarily I handle civilian personnel matters. But I also
18 have--handle all the labor issues for the base. I meet with the
19 Union, do negotiations and stuff, but the majority of my work is done
20 in MSPB hearings or before the EEOC.

21 Q. When did you arrive at Marine Corps Base Quantico?

22 A. I arrived at Marine Corps Base Quantico in 2009.

23 Q. And what was your initial position there?

1 A. My initial position; I stood up the Civil Law Office.

2 Q. And how long were you in that position?

3 A. I was in the Civil Law Office from July of '09 until
4 December of 2010.

5 Q. And what happened in December of 2010?

6 A. In December 2010, both the Deputy IG at Marine Corps Base
7 Quantico kind--he resigned, you know, pretty fast. And the actual
8 IG, she decided she was going to retire. So there was a vacancy in
9 the deputy's office and the IG herself was getting ready to
10 transition. So they needed somebody to fill in--you know, in the
11 deputy's--deputy IG office permanently.

12 Q. And who filled in?

13 A. That was--I was the one that was selected to become the
14 Deputy Inspector General.

15 Q. What did you do--what was your respons--what were your
16 responsibilities as Deputy Inspector General?

17 A. Primarily I was the eyes and ears of the commander. There
18 was five functions that an IG has, but prim--my primary duties were
19 one of inspection where I'd go and inspect units to ensure that they
20 were complying with different SOPs and stuff. But then I was also
21 charged with investigations. My daily duties included monitoring
22 what was called the Base Commander's Mailbox, which is similar to
23 like a hotline system where individuals could submit questions,

1 problems, or concerns directly to the base commander. And I was the
2 one that would actually read those emails and then address those
3 concerns.

4 Q. Let's talk a little bit about each of those. Why would you
5 conduct an inspection?

6 A. Inspections are--are conducted--I don't want to say
7 annually, but usually every two or three years. So you'd go in and
8 inspect the unit to ensure that they have all of their personnel--
9 personnel records up to date. You'd inspect to ensure that they're
10 following the proper policies for their unit. And then advise them
11 on what they should--could do better, not only for their unit, but
12 also for the people that they serve.

13 Q. And what would initiate an inspection?

14 A. Usually--it's--it's all based off a calendar so that if--
15 you know, if you hadn't done an inspection on a unit over, you know,
16 a year or two, then you'd go back. So we had a running tally as to
17 what units were due inspections during what--during which year.

18 Q. And why would you conduct an investigation?

19 A. An investigation would be conducted if somebody had a
20 complaint about something that was going on at the base, you know.
21 Some of the inspections that--I'm sorry--yeah, some of the
22 investigations that we did--excuse me--had to do with different
23 community services, for instances, that was being done at the base,

1 or somebody had a complaint with the cleanliness of a building, or
2 somebody had some concerns over the security at certain buildings.
3 So they would send in their complaint to the Base Commander and then
4 I'd look into it.

5 Q. And who was able to lodge a complaint?

6 A. Pretty much anybody is able to lodge a complaint. There's-
7 -not only do we have a hotline where somebody could call in and voice
8 their concerns, but there was--like I said, you could actually go on
9 the Quantico website and there's a link that you hit on the Quantico-
10 -Marine Corps Base Quantico website and actually submit an email that
11 would go directly to the Base Commander and I'd read that email.

12 Q. And how did you determine which complaints were
13 investigated?

14 A. All the complaints were looked into to some form. Some
15 took more work than others. Others would be, you know, maybe I'd
16 have to pull the SOP or regulation. And then I could shoot them back
17 an, you know, a one liner. Or for the most part I'd have to ask them
18 extra questions, you know, what are they really hoping to find out
19 about this. You know, some of the things are vague so I'd have to
20 kind of go back and kind of flesh out what the real issue was and
21 then try and resolve it to the best of my ability.

22 Q. Let's talk a little bit more about PFC Manning's
23 confinement at that brig. When did you first become aware that PFC

1 Manning was confined at the brig?

2 A. The first time I became aware--I want to say it was in--in
3 probably fall of '09--I'm sorry--I'm sorry, Fall of 2010, doing--I
4 was still in the civil law office. You know, part of my function in
5 the civil law office at the time--Colonel Choike, the Base Commander,
6 he'd often ask me different questions or concerns regarding
7 regulations, policies, et cetera. And the first time I believe I
8 became aware of it was maybe at a staff meeting or something we had
9 weekly where somebody had brought up the fact that he was there.

10 Q. When did PFC Manning's confinement first become an issue
11 for you as Deputy Inspector General?

12 A. When--in early December, I started to see that there were a
13 lot more--there was a lot more traffic in the--not only in the media,
14 but also in--in emails, phone calls, et cetera, and--why I say that
15 is at the time Ms. Epel, who was Inspector General for the base, I
16 was her legal counsel. So she would come--she came to me in early
17 December saying she had some concerns with the amount of information
18 that was being put out there and some of the things they were saying.
19 That was early December. I actually transitioned into the IG office
20 on the 13th of December. From the 13th of December until--until I
21 actually went and inspected the brig on the 27th of December, I want
22 to say we had anywhere from 500 to, you know, 1000 phone calls that
23 were coming into the base and through different medias regarding PFC

1 Manning.

2 Q. And what did you do in response?

3 A. Well, initially when I--when we started seeing some of the
4 traffic, the majority of the stuff that was coming into the Base
5 Commander's mailbox, when I'd write back to ask them what basis they
6 were making the statements they were doing, most of the emails were
7 not valid emails. Okay, so initially from December 13th until the
8 23d of December, there wasn't really much I could do. The majority
9 of the things, like I said, they were fake email accounts or some--
10 or, you know, people saying--my response is going back to them saying
11 this email account's been closed, *et cetera*.

12 On the 23d of December, I went to Colonel Choike and
13 told him that I had some concerns because some of the things that
14 were being put in the media at that time directly--you know, I felt
15 were unfair or I felt that they were maybe not accurate, so I think
16 they needed to be looked into. At that point I told him I was going
17 to call Headquarters, IG and ask them if they would like to take this
18 case and come down and conduct an investigation of the brig. At that
19 point they told me they had no interest in conducting an
20 investigation. So I had a meeting with Colonel Choike on the 23d of
21 December telling him that I wanted to go ahead and conduct an
22 investigation of the brig.

23 Q. And, sir, who was----

1 MJ: Can I just interrupt you to make sure I understood that.
2 You went to Headquarters to try to get a Headquarters directed
3 investigation, and it was that higher headquarters that had no
4 interest?

5 WIT: Right.

6 MJ: Okay.

7 WIT: Yes.

8 MJ: Thank you.

9 WIT: My high--the higher headquarters for the Inspector
10 General's Office, ma'am.

11 MJ: Sorry to interrupt you. Go ahead.

12 WIT: Sorry.

13 [Examination of the witness continued.]

14 Q. Now, Major Zelek, was that HQ IG for the Marine Corps?

15 A. That is correct. The--Cynthia Edwards, the part that--
16 that's my--she does the investigations for Headquarters, Marine
17 Corps.

18 Q. Let's talk a little bit about you report.

19 A. Okay.

20 Q. What ultimately was the basis for your deciding you needed
21 to initiate it?

22 A. Well there--as I said there's--there was a lot of
23 accusations and there were a lot--there was a lot in the media that

1 said PFC Manning was being mistreated at the brig. Having worked for
2 Colonel Choike going on two years, I understood that, you know, he--
3 for me--he--he really cared about not only Marine Corps Base
4 Quantico, but he cared about all the people that were aboard his
5 base. And so anytime there was something--well, something out there
6 in the media, in a report, or somebody told him somebody was being
7 mistreated aboard his base, I knew it was a concern to him. I mean,
8 I know you he wanted me to look into it. And so when I saw that this
9 traffic was increasing that's when I decided--I recommended to him
10 that we needed to do something. We needed to conduct an
11 investigation.

12 Q. And what was Colonel Choike's response?

13 A. You know, I--at the time is when he--is when he said are
14 you sure, you know, Headquarters, IG didn't want to do it? And I
15 said, yeah. And then I was--ultimately I remember convincing him to
16 let me go to the brig and conduct the investigation.

17 Q. Let's talk a little bit about the investigation itself.
18 What--how did you start it?

19 A. On the 27th of December--and I'm not sure what that day
20 was--but I want to say it was either a Monday--a Monday or Tuesday
21 because it was after the holiday break. I had contacted at the time
22 a Captain Tomczak to let--to just give them a courtesy notification
23 that I was going to be going to the brig that day. At the time from

1 what--from my--from what I remember, Colonel Choike and I were the
2 only ones that had conversed about actually going and doing an
3 investigation of the brig. But at the same time, you know--at the
4 same time I just wanted to let them know I was coming there so that
5 they knew. But they weren't given any kind of advance notice because
6 I really want to preserve the brig and be able to, you know,
7 investigate it without them having any time to prepare.

8 Q. And who was Captain Tomczak?

9 A. At the time I want to say he was--he was either the XO of
10 Security Battalion or and Operations Officer, I'm not--I don't
11 remember exact--what his exact title was.

12 Q. So what was your next step?

13 A. Once I told him I was going over there, he met me at the
14 brig--at the front door. And that's when he got Chief Warrant
15 Officer Averhart and I think it was Master Sergeant Papakie--I
16 believe he was there--and that's when they checked me into the front
17 of the brig.

18 Q. And after getting check in, how did you begin your
19 investigation?

20 A. Initially, you know, I wanted to check out the--just the
21 general, you know, areas of the brig. We started--we started in the
22 chow hall area. I checked--you know, pretty much I walked through
23 the chow hall area and made sure that the conditions were sanitary--

1 making sure that there wasn't anything that seemed out of place.
2 From there--you know, I directed to him that there were certain areas
3 that I wanted to see. I wanted to go out and see the recreational
4 area that was outside. So we took a walk out there. You know, I
5 kind of observed not only the larger recreational area, but also the
6 maximum custody recreational area because I know that was receiving a
7 lot of publicity in the news.

8 From there he took me to an area of the brig that I
9 know was--even though--he told me it was shut down, but I still
10 wanted to look at it. He told me it was there--it was their--the
11 maximum security area of the brig, okay. That's where--that section
12 of the brig was not being used, but you could tell that it was for--
13 it was a much more confined area because it had a lot better--a lot
14 more security measure, *et cetera*. And he told me that, you know,
15 Marine Corps Base Quantico had not used that area of the brig for
16 some time. That's where, you know--you know, for those of us that
17 follow the news, that's where they had kept Hinckley back when the
18 Reagan assassination attempt was.

19 Q. Let's talk a little bit about those. What did the door
20 look like to the cell in this area that wasn't being used?

21 A. Well there was--there was a much--from what I remember
22 there was a bigger electronic door that had to be triggered. You
23 could tell that it was much--for me it looked like it was a much more

1 secure area inside--you know, what I mean--in general. So once you
2 got in there, there was a row of--a narrow hallway and then there was
3 a row of cells. And the only way I can describe it is those cells
4 were about half the size of where--of the--of where the special
5 quarters cells where all the other prisoners were being kept. Once
6 you got in there, there was another locking mechanism--another set of
7 security bars or something that went across the front, which was
8 either made out of--I don't remember what the doors were, but I
9 remember there was a--some kind of door and then there's a set of
10 bars that came in after that. So there was actually like three sets
11 before you could actually access the cells.

12 Q. Let's talk a little bit about the recreation areas you
13 reviewed.

14 A. [Responded in the affirmative.]

15 Q. What--what did--what was the recreation area like where PFC
16 Manning was given recreation call?

17 A. It was just--from what I remember it was about the size,
18 maybe, of a basketball court. It did have like a basketball hoop in
19 there. And then there was a fence around it--maybe--maybe a 10 foot
20 high fence around the whole thing. And then there was one entrance
21 into it--just a gate.

22 Q. What did the cell in which PFC Manning was held in--what
23 did they look like?

1 A. When--when you got down to where--what they told me were
2 special quarters cells, when you got down there, there was another
3 door. There were actually two entrances on each side of where the
4 duty hut was. There was another--I don't remember if there was a
5 door that actually opened up or a door that slid--I want to say it
6 was a door that opened up. The door--you had to--they notified
7 someone and the door opened up. And then, as I said, there--or as I
8 entered it there were cells on each side and the cells that went on
9 in the back behind the duty hut.

10 Q. And how many detainees were housed with another detainee in
11 a cell immediately adjacent?

12 A. At the time that I inspected the brig, from what I--from
13 what I remember, I think there were eight detainees in the brig. And
14 the way they were spread out--as I said, all the deta--all the
15 detainees were located in the special quarter's section. And each
16 one had their own cell--one with an empty cell next to him and then
17 another detainee, then an empty--an empty cell, and then another
18 detainee.

19 Q. What did--what did you do to reach your conclusions about
20 PFC Manning's custody and status at the brig?

21 A. Well I went--they took me in the opposite end of the--the--
22 where PFC Manning was being held. So I had to opportunity to
23 actually go through and observe all the detainees that were being

1 housed there. As it's custom when an officer comes on, they--they
2 called everyone--they said "attention on deck", you know, which
3 notified everyone that when an officer's on deck. And each of the
4 detainees actually stood up--stood up and stood at the front of their
5 cell. So as I went by each one, you know, I either, you know, gave
6 'em a greeting of the day. A couple of them I, you know, I recall
7 asking how they were doing. And some of them responded to me, others
8 didn't. So as I went through there--like I said, I made sure that I--
9 -I took the time to observe each and every cell, each and every
10 detainee being housed, and then I walked around and--the very last
11 cell before you get back to the end where--is where PFC Manning was
12 being held right--which was right in front of the duty hut.

13 Q. With whom did you speak about PFC Manning's--the
14 determinations about his custody and status?

15 A. The--just--I think--I think it was a Master Sergeant
16 Papakie--I think that's what his rank was--and Chief Warrant Officer
17 Averhart, and then when she checked in, Chief Warrant Officer Barnes.

18 Q. How long did your entire review take?

19 A. The--I want to say my--'cause--after I went through--after
20 I went through and observed all the detainees in the area, I--I went
21 into the duty hut for about--I want to say it was like 5 to 10
22 minutes, and--stayed and was conversing with Chief Warrant Officer
23 Averhart and directly observing Manning. After that they took me

1 down--there were couple of areas I wanted to check 'cause I didn't
2 get to go back where the other side of the brig was. And down the
3 other way was where the recreational room was. They had--the
4 recreational room was--I think they had like a TV room and some
5 magazine and books. But then they also had an exercise room that I
6 wanted to make sure I got a chance to check out. And so I went down
7 there and observed that also.

8 Q. And how long did you check out the exercise room?

9 A. The--I wasn't in the exercise room more than--I want to
10 say--not more than 10 minutes. I recall--when I was in there, I
11 actually--I turned on like a piece of equipment, you know, I hit the
12 pedals on one to make sure they worked. And--but--I went--I mean the
13 whole brig visit, I want to say I wasn't there for more than an hour
14 and a half--maybe two hours at the most.

15 Q. Did the machine work?

16 A. Yes.

17 Q. And how large was the area?

18 A. It was probably--the--the actual exercise area, maybe
19 about--about as big as this courtroom here--because--they had a lot
20 of machines in it. So.

21 Q. Would you say---

22 A. Maybe from like your podium to the back wall.

23 Q. Would you say approximately 30 feet by 30 feet?

1 A. I'm not very good at those kind of dimensions. But I--I--
2 if that's what--from your podium to the back wall is I'll--I'll give
3 you that.

4 MJ: That's fine.

5 WIT: Thank you.

6 Q. When did you complete your report?

7 A. I completed my report on the 28th of December. You know
8 one of the things that, you know, I--I tried to do not only in my job
9 before is to be proactive--to be out in front of these things, but
10 also try to be very timely because I knew the Base Commander had some
11 concerns about what was being said. And so I made it an effort to--
12 once I got back, you know, to get to work immediately on it to start
13 drafting up the report. So I--I believe I dated it 28 December, but
14 I'm not positive. So.

15 Q. To whom did you give the report?

16 A. I gave the report to Colonel Choike.

17 Q. And what response did you receive after completing?

18 A. Thank you--thank you for conducting this report. You know,
19 I have it from here. As in all the investigations, it's up to--you
20 know, the inspector general acts as the--you know, does an
21 independent review and does an investigation--he just turns it over
22 to the commander. And it's up to the commander, whatever unit it is,
23 and this place was Colonel Choike, to determine what, if any action,

1 he was going to take.

2 Q. Let's talk a little bit about David House.

3 A. Okay.

4 Q. Are you familiar with Mr. House?

5 A. Yeah, I'm--I'm familiar with him. I've never met him, but,
6 you know, I'm familiar with the name.

7 Q. How are you familiar with him?

8 A. He--from what I remember at the ti--he was the one that was
9 visiting PFC Manning while he was confined at--while he was in
10 pretrial confinement.

11 Q. Let's talk a little bit about an incident where David House
12 was allegedly denied entry into Quantico. What do you remember about
13 that?

14 A. I remember it being a Saturday. And he--he was actually--
15 he--he actually came to the base with another individual. She was
16 either a reporter or a blogger of some sort because I remember while
17 she--while they were trying to get her access to the base, she
18 actually put out a blog on it. They showed up at the base and--the
19 two of them show up at to the base--I want to say she was driving and
20 there was some issue with them being allowed access to the base at
21 that time, either they're--like I said, I don't remember what the
22 problem was with either--there was an expired license or expired
23 registration, but something with regards to base security and the SOP

1 that would not allow them access to the base.

2 Q. And what was the response of the personnel at the gate?

3 A. The personnel at the gate detained them. They tried to
4 find a way to get David House access. You know, I want to say they,
5 you know, they first suggested he could walk to go see him. But they
6 also tried to convince him to, you know, get a cab. From what I
7 remember they provided him numbers with a cab company. And I think--
8 and I don't remember, but I want to say that somebody even offered to
9 give him a ride to visit PFC Manning.

10 Q. What is the basis for your knowledge of this event?

11 A. The basis of my knowledge was--you know, as I said, there
12 was a blog out there on this. So I had already read about the blog.
13 I read about the newspaper articles that were published. But then I
14 also remember that Monday being involved in a meeting--and I'm not
15 sure who was at the meeting, but I know Colonel Choike was there,
16 maybe--maybe Chief Warrant Officer Averhart, and, you know, maybe
17 Colonel Oltman where that was discussed about the incidents and what
18 happened over the weekend.

19 Q. And what did Mr. House do after being offered these
20 alternatives?

21 A. From--from what I was--from what I remember I think he
22 declined them all. And they were never able to--they were never
23 able, you know, give them access based off, you know, his

1 credentials. So--they weren't going to let the car on base. So I
2 think the car was eventually towed off-base. It was searched first,
3 I think, and then it was towed off-base.

4 Q. And what did the press report based on statements from Mr.
5 House?

6 A. That--from what I remember, that the Marine Corps was going
7 through added steps of preventing PFC Manning from having visitors.
8 And that, you know, that we were specifically targeting David House
9 to not allow him access to the base due to the fact that he had made
10 some prior statements in the press about--you know, about the
11 condition of PFC Manning.

12 Q. And why are you familiar with Mr. House's statements to the
13 press?

14 A. I read them. I read--I read about them, you know, in
15 previous newspaper articles. You know, after--you know, it became
16 readily apparent to me after I did my report that this thing was only
17 going to heat up more. You know, I was consistently receiving
18 emails--I want to say, you know, 30 to 50 emails a week. At that
19 point we started receiving letters in the mail. So I actually became
20 a focal point for not only the Base Commander's mailbox, as I was
21 doing before, but I became a focal point for all the letters. And
22 then--so in conjunction with that, I was monitoring the press to see
23 what was being said and, you know, 9 times out of 10, people would

1 cut a section from the press article and put it in their letter and
2 then send it into me. So.

3 ATC[CPT VON ELTEN]: Thank you.

4 MJ: Okay. Mr. Coombs.

5 **CROSS-EXAMINATION**

6 **Questions by the civilian defense counsel:**

7 Q. Major Zelek, Colonel Choike was your commander, correct?

8 A. He was the Base Commander, yes.

9 Q. And because you're the Deputy IG under the base he would be
10 your base commander?

11 A. Yes, that's correct.

12 Q. And you were requested by him to conduct a unannounced
13 visit of the brig, is that correct?

14 A. I don't recall him req--requesting me to do that. As I
15 said before, I remember going to him and trying to be proactive to
16 head this off.

17 [Pause]

18 CDC[MR. COOMBS]: Major Zelek, I'm handing you Appellate
19 Exhibit 442A [handing the document to the witness].

20 Q. Do you see in this email where Colonel Choike indicates
21 that he directed you to do an unannounced visit of the brig?

22 A. [Looking at the document] It says in here that he asked--he
23 asked me to do that. That's correct. This is the first time I've

1 seen this email. Trying--I'm just flipping through here to see if--
2 okay.

3 Q. And I just want to make sure your memory is that you went
4 to Colonel Choike and said, hey, I think--let me do the visit of the
5 brig?

6 A. That's correct. And I--I have a--I have a--I have a binder
7 that I keep track of my day-to-day happenings. And I pulled up the
8 binder from that time period, and in my notes it says, you know, that
9 I went to Colonel Choike, I had a meeting, and I recommended to him
10 that we do an inspection of the brig.

11 Q. Okay, so when Colonel Choike says there I requested that my
12 Deputy IG do an unannounced inspection of the brig, you think he's
13 just res--basically recounting your request of him to let you do the
14 visit, is that right?

15 A. That's--that's correct. That's--that's how I remember it.
16 And I know that's what my notes reflect.

17 Q. And prior to your visit based upon your, I guess,
18 monitoring of the blogs and of newspaper accounts, you were aware
19 that there was quite a bit of international attention on PFC
20 Manning's confinement, correct?

21 A. That's correct.

22 Q. And you knew that Colonel Choike was going to use your
23 inspection regarding his decision on how PFC Manning was being held?

1 A. As I stated before, as--as an inspector general for the
2 base--at the time I was the acting--I'm--as an independent body it's
3 up to me to do the inspection. Ultimately it's up to the commander
4 to determine or to use the inspection for what he wants. So that
5 would be up to him as to what he wanted to use it for at that point.
6 And I don't recall asking him what he was going to use the report
7 for.

8 Q. Well, due to the high profile nature of it, you knew that
9 he was obviously going to use your report?

10 A. That's correct.

11 Q. And you also knew that and understood that Lieutenant
12 General Flynn would probably see your report as well?

13 A. That's correct. Yeah, he's the--he was the CG of MCCDC at
14 the time.

15 Q. And prior to conducting your inspection, you believe that
16 the reports that were in the press were unfair?

17 A. The things that were saying--you know, I--I--being in the
18 Marine Corps for 12 years, we have training every year that deals
19 specifically with hazing. We have training that deals with how you
20 treat other individuals. And the things that they were saying in
21 there, I--I felt was unfair because I couldn't think that a Marine
22 would actually engage in the activity that they were saying was
23 happening.

1 Q. Right. And you also believed that--then obviously that the
2 reports were not accurate?

3 A. I wanted to find out whether or not there was any truth to
4 the reports.

5 Q. And so when you went to the brig to conduct your
6 inspection, I believe you testified on direct that the entire
7 inspection took around an hour and a half to two hours at most?

8 A. That's correct.

9 Q. And when you were doing your inspection, you were not
10 checking on whether or not PFC Manning was improperly held in MAX
11 custody, correct?

12 A. No, that was not part of it.

13 Q. And you were also not inspecting whether or not PFC Manning
14 was improperly held in prevention of injury, correct?

15 A. No, but I did ask questions about it. I asked because some
16 of the reports that I was seeing in the newspaper addressed that. So
17 from my own--not only from my own benefit, but I thought it would
18 enhance the report, I asked questions as to what those terms mean.

19 Q. Right. But you weren't inspecting to basically give your
20 seal of approval that MAX and POI was appropriate for PFC Manning?

21 A. That's correct.

22 Q. The sole purpose, I believe, of your inspection was to
23 determine whether or not the facility was sanitary and safe and how

1 each detainee was being held?

2 A. That's correct.

3 Q. Now as part of your inspection you did not interview PFC
4 Manning, correct?

5 A. I did not interview him. But as I said before, I did--as I
6 stopped--all the detainees--I stopped in front of his cell. And I
7 remember him--like I said, he was standing at the cell. I remember
8 giving him a greeting of the day. He gave me one back. And I--I may
9 have asked him how he was doing or I asked him some other question,
10 at which point he never responded to me. So, you know, and that had
11 happened with a couple of other detainees, so I didn't press the
12 issue.

13 Q. All right. But--my question was you did not interview him
14 as part of your investigation?

15 A. I did not.

16 Q. So you were not asking him questions on whether or not he
17 thought he was being mistreated?

18 A. No I did not.

19 Q. And as part of your inspection you did not also interview
20 the mental health providers?

21 A. I did not.

22 Q. You didn't review any of the mental health providers'
23 records either?

1 A. No.

2 Q. You did, however, take a tour of the facility with CW4

3 Averhart?

4 A. I did.

5 Q. And as part of that tour did you review the weekly reports

6 that were being filed by CW4 Averhart?

7 A. I remember seeing a couple of the reports when--of that--I

8 want to say it was just--I don't want to say--I want to say I

9 remember--I remember seeing the reports after the fact that I did my

10 report, not beforehand.

11 Q. And if I understand correctly, as you were doing the

12 inspection, you would ask certain questions of either CW4 Averhart or

13 one of the guards and they would respond to you?

14 A. That's correct.

15 Q. And you're, of course, trusting that their responses to you

16 were truthful?

17 A. I did. That's correct.

18 Q. As part----

19 A. And then I also--I mean, they're--I asked--I also asked the

20 guards some questions when, you know, Chief Warrant Officer Averhart

21 would go and get me an SOP or get me something--and so I would talk

22 to the guards to check to see if their statements were different and

23 make sure that everything was consistent.

1 Q. Okay. And as part of your inspection you obviously
2 understood that PFC Manning was being held in maximum custody and
3 under prevention of injury?

4 A. That's correct.

5 Q. And due to--due to the maximum custody and prevention of
6 injury status there were certain privileges that PFC Manning was not
7 afforded, correct?

8 A. That's correct.

9 Q. You--you noted that he was not allowed to have contact with
10 other detainees?

11 A. He--you know--that's correct, he was--he was not allowed--
12 he--well, when you say not allowed----

13 Q. Physical contact----

14 A. ----I mean, he isn't----

15 Q. ----with other people.

16 A. ----that's correct--person--right.

17 Q. And due to the arrangement of cells, as you noted, no
18 detainee could see each other because of how the cells were located?

19 A. That's correct.

20 Q. And you said during your inspection there were no detainees
21 that were housed directly to the left or right of somebody?

22 A. That's--not--not while I was there.

23 Q. And did you ask at that point whether or not detainees

1 could speak to others in low conversational tones?

2 A. I did.

3 Q. And the guards told you they could do that as long as they
4 were not disruptive, correct?

5 A. That's correct.

6 Q. And did you indicate or did the guards indicate to you what
7 they would consider to be disruptive?

8 A. Just--you know, yelling--any kind of like, you know,
9 shouting, or, you know--I want to say, you know, making inappropriate
10 comments, you know, just talking, you know, things that would not be,
11 you know, appropriate in a conversational setting out loud.

12 Q. Did any of the guards state to you that if a detainee was
13 not immediately to your left or to your right that you could not
14 speak to them?

15 A. They did not.

16 Q. Now you said you--you took a look at the recreational areas
17 that were available?

18 A. I did.

19 Q. And you looked at the outside rec area and inside rec area?

20 A. I did.

21 Q. And with regards to the inside rec area, you said you look
22 at a couple of the machines, you turned one of them on, and you
23 pushed a pedal?

1 A. Correct.

2 Q. And when you turned on the machine, did you actually check
3 to see if the machine was functional?

4 A. I--I did--I just want, you know, I wanted to make sure that
5 if you turned it on that the--all the--it was, you know, like a
6 treadmill, and I wanted to make sure the thing moved--you know, the
7 belt moved--you know, if somebody got on it, it was going to work.

8 Q. All right, so you actually turned it on and then you made
9 the belt go?

10 A. Well, you can--I mean you can hit the--you know, the mile
11 per hour thing to make the belt go on its own. So----

12 Q. And is that what you did?

13 A. ----I didn't get on it--I did, yes.

14 Q. And what did you find?

15 A. I found it worked and I turned it off.

16 Q. And did you do that with every machine there or just one?

17 A. I did not--just one. And--I mean, the other stuff--I mean,
18 so long as it looked like it was in good repair or good state, I--you
19 know, I didn't think I needed to test every piece of equipment that
20 was in there.

21 Q. And at the time that you checked the machine did anyone
22 tell you that PFC Manning basically from 29 July to 10 December 2010,
23 just shortly before your inspection, was not permitted to get on the

1 treadmill?

2 A. No they did not. And--you know, I remember them saying he
3 had come down there to use the equipment, you know, I don't recall
4 asking what equipment he used. I recall they said that they did take
5 him down there to use it.

6 Q. Did anyone ever tell you that during that time period, the
7 29 July to 10 December 2010, he was only given 20 minutes of rec
8 call?

9 A. No, they--they actually told me he was given at least an
10 hour of rec call.

11 Q. Did anyone ever tell you that when he was given his rec
12 call outside that he was kept in full restraints?

13 A. They did not tell me that. In fact, they said--you know,
14 if they--once they put him the--the area that he had, they said they
15 removed the restraints.

16 Q. And did anyone ever tell you that once they took him to the
17 inside rec area, they removed the restraints with the exception of
18 the handcuffs, and would only let him use the bike?

19 A. No, they told--they told me they'd remove those restraints
20 also.

21 Q. Would you surprise you if--if those were the actual facts?

22 A. That they left the restraints on? It would.

23 Q. And why is that?

1 A. Because from my memory, I was told that, you know, when--
2 when they got in that area and they closed it that they removed all
3 the restraints.

4 Q. And do you recall who told you that?

5 A. It would have to be one of the individuals that was on the
6 tour with me; either Master Sergeant Papakie or Chief Warrant Officer
7 Averhart.

8 Q. Now you--you said you looked at the outside area and was
9 the--roughly the size of a basketball court?

10 A. For the--for the maximum security area; that's correct.

11 Q. And the area not for the maximum security area, that was
12 much larger?

13 A. It was.

14 Q. Did you see any equipment in the area for the maximum
15 security detainees, like basketballs or anything like that?

16 A. There's--there's no equipment in either area. You know, it
17 was just a big--it was a big open field. And I was told that, you
18 know, they might be provided a ball or--a soccer ball or something to
19 use.

20 Q. Did they ever show you any of that equipment?

21 A. No, and I didn't--I didn't ask to see it.

22 Q. Now also because of the way PFC Manning was being held, you
23 were aware that he was kept in his cell for 23 hours a day?

1 A. I was, yes.

2 Q. And required to eat in his cell?

3 A. That's correct.

4 Q. Were you informed that he was not permitted to have

5 personal items in his cell?

6 A. I was aware of that.

7 Q. And did you know that he would have to request for toilet

8 paper if he needed it?

9 A. I was aware of that also.

10 Q. And what about having to request for soap. Did you know

11 that?

12 A. I--I--I was aware he had to--he was given very few items in

13 his--in his cell with him?

14 Q. And you indicated that PFC Manning's cell was directly

15 across from the observation booth?

16 A. That's correct. Kind of like, you know, it was kind of

17 kitty-corner. So--there's like a one-way glass that I could observe

18 him directly.

19 Q. And when you could observe him could you see him clearly?

20 A. I could.

21 Q. Did you during your time there ever see the guards go out

22 to make their five minute notation on PFC Manning?

23 A. No. They--they made--they made--they had a book that was

1 inside the duty hut where they'd make their notations there. And
2 then I--I remember specifically looking at that where they said
3 checked--you know, I don't remember what it said. And--so I asked
4 them--I said, you know, when you did this, you know, what--do you
5 actually go out there and do it or you stay? And the mo--they said
6 during the normal hours if they could see him, they would make it
7 right from the duty hut--they'd observe him from there and do it.
8 That's what--when I was there during my time, they had made two
9 entries that they had--you know, he was there and was okay.

10 Q. Okay. When you said you were in the observation booth and
11 you could see him, what was PFC Manning doing at that point?

12 A. PFC Manning--I remember him being in like a grey--like grey
13 sweatpants or grey sweatsuit type thing. And he was sitting on his
14 rack reading a magazine. I don't--don't remember--recall what
15 magazine, but I do recall he had two magazines that he was looking
16 at.

17 Q. Oh, he had two magazines at the time?

18 A. There was--I remember it was either a magazine or some
19 other book. There was one laying there and then he had one open that
20 he was looking at.

21 Q. Okay. And based upon your observation of him did you
22 notice any odd behavior or anything out of the ordinary?

23 A. No. I mean, he just--like--like I said, he just was

1 reading a magazine.

2 Q. And after conducting your--your tour of the facility for an
3 hour and a half to two hours, then I imagine you left at that point?

4 A. Yeah. Like I said, after I finished observing him is when
5 I went down to the other areas of the brig. I walked around a little
6 bit more--just the hallways because I was trying to get a feel for
7 like temperature, I was trying to get a feel for cleanliness, and
8 just--you know, trying to, you know, get a lot more observation time.
9 But after that is when I went to--they have a mailroom there. And
10 they had--they showed me all the mail and the letters that they were
11 getting for him. So I remember seeing the mailroom--and that they
12 had at that point I don't know how many letters, sir. I remember
13 having a conversation with them; who was monitoring these and that?
14 And that's when--I remember after that specifically went back to
15 Colonel Choike saying, hey, you know, it's--sir, why--you know, since
16 I'm doing this, you know, I'll be the repository for these letters--
17 start going through these letters, et cetera. And then after that, I
18 went back into Chief Averhart's office--asked him for--I think it was
19 the SOP that was included in my report. And then asked him a few
20 more questions, and then I left.

21 CDC[MR. COOMBS]: Okay. I'm retrieving from the witness 442A
22 [handing the document to the witness], and handing the witness
23 Exhibit 442B [handing the document to the witness].

1 Q. Major Zelek, is that your report?

2 A. [Looking through the document] Yes, this--this is the
3 report I drafted. My report--the only thing different about mine is,
4 you know, I have--I have my notes on it and highlighted and stuff.
5 So.

6 Q. And prior to doing this report obviously you were--as
7 monitoring the Commander's inbox, you were aware of what was going on
8 in this case in general, correct?

9 A. I was, correct.

10 Q. And I'm going to show you another appellate exhibit here
11 shortly and see if this is also due to looking at that mailbox.

12 A. One--if I may?

13 Q. Sure.

14 A. One thing about--my report had all these references
15 attached to it also. So, you know, while this would have my top, I
16 would not--in my report that was submitted to the Base Commander
17 would have had the newspaper articles, the instruction, and also the
18 SOP to it. So.

19 CDC[MR. COOMBS]: Retrieving from the witness Appellate
20 Exhibit 442B [retrieving the document from the witness], and handing
21 the witness Appellate Exhibit 442C [handing the document to the
22 witness].

23 ATC[CPT VON ELTEN]: Your Honor, may the government see Charlie?

1 CDC[MR. COOMBS]: I apologize [handing the document to the
2 assistant trial counsel].

3 Q. Major Zelek, looking at this it appears that you are
4 tracking email or newspaper articles in January of 2011, is that
5 correct?

6 A. That's correct.

7 Q. And so can you--do you recall this email to Colonel Choike?

8 A. [Looking at the document] I do. You know, this would be
9 probably one of several--whenever there was a high vis or an article
10 that was--you know, I thought of importance, I ensured that he got
11 either--he got a hard copy of it or he got the link so he could look
12 at it.

13 Q. And how--how would you find these articles yourself?

14 A. Well there's--the--there are a few websites out there that
15 I knew were putting articles out there. And so I would start with
16 the website I was familiar with. And then I would go--if they--a lot
17 of them had links, and then I'd go and check those out.

18 Q. And were you doing this as part of your job as the Deputy
19 IG?

20 A. Yes. That's correct.

21 Q. And that was just because it may be an issue that the
22 command needs to be aware of?

23 A. It was because the--not only was it by the fact that he was

1 in our brig--PFC Manning was in our brig, but there was--at this
2 point in January, we started to receive threatening phone calls. We
3 started receive individuals saying that they were going to shut down
4 our computer systems, shut down our phone systems. We were getting
5 stuff out there--I believe it was Martin Luther King Day; they staged
6 a protest out in front of our gates. So there was a lot of thing--
7 there were a lot of things happening that--in this case that were
8 affecting Marine Corps Base Quantico.

9 CDC[MR. COOMBS]: Okay, I'm retrieving from the witness
10 Appellate Exhibit 442C [retrieving the document from the witness],
11 and handing the witness Appellate Exhibit 442D [handing the document
12 to the witness].

13 Q. Appellate Exhibit 442D--it appears that you were reviewing
14 something regarding request for support. And I imagine this--this
15 had to do something with trying to get a full time mental health
16 provider at the brig, is that correct?

17 A. [Looking at the document] You know, I--I don't--I can't say
18 if it was--had to do with the mental health provider. I know that--
19 you know, when I see the word support, and I remember the meetings
20 that were going on, the brig was understaffed from what I remember.
21 They did not have enough--they did not have adequate personnel to--
22 you know, to--to take care of the prisoners according to the SOP,
23 especially with one that was under--you know, under 24 hour

1 surveillance. And then--I also know they were concerned because of
2 earlier that year they're--you know, earlier 2000--2011--I'm sorry,
3 earlier 2010, they had the suicide that was--had happened at the
4 brig.

5 Q. Okay. And so from your involvement, can you tell me why
6 you would be reviewing a letter to say that you believe it captures
7 the most of what we're trying to achieve?

8 A. From my standpoint--you know, I was--I was involved in the--
9 -you know, the weekly meetings or the monthly meetings regarding the
10 brig and the concerns that were happening there. So I--I would--I
11 was part of the cc line in this email. And since--you know, since my
12 name was on it, you know, I took a look at the document to say, hey,
13 you know, I read it. And, you know, I guess that, you know,
14 commented on the change there.

15 CDC[MR. COOMBS]: Okay. Retrieving from the witness Appellate
16 Exhibit 442D [retrieving the document from the witness]. Thank you,
17 Major Zelek.

18 WIT: [Responding in the affirmative.]

19 ATC[CPT VON ELTEN]: Nothing, Your Honor.

1 **EXAMINATION BY THE COURT-MARTIAL**

2 **Questions by the military judge:**

3 Q. Major Zelek, I have a couple of questions for you.

4 A. Yes, ma'am.

5 Q. Back in December when--I believe your testimony was earlier
6 you had read some of the newspaper articles and you were concerned
7 and you had approached Colonel Choike about doing this investigation,
8 but prior to that you had gone to the Headquarters, Marine Corps, and
9 that they weren't interested. Why weren't they interested?

10 A. I can't comment, ma'am. The conversation--I remember
11 having the conversation with Colonel Choike on the morning of the
12 23d--going back to my office, calling Headquarters Marine Corps IG,
13 you know, voicing my concerns to them, you know, telling them what I
14 was reading and, you know, what was happening there. And then, you
15 know, pretty much them telling me, you know, they had no interest in
16 it. It was up to us to decide what we want to do with it. And I
17 remember going back up to Colonel Choike's office and saying, you
18 know, that it was--it would probably be in our best interest to do
19 an--you know, an investigation, you know, quality of life type
20 investigation of the brig.

21 Q. Why did you have to convince Colonel Choike to do the
22 investigation?

23 A. You know, at the time--I mean--we had--up to that point--I

1 mean there was a--there were--there were numerous articles in the--in
2 the paper. And, you know, I want to sa--for the most part, you know,
3 the stuff that was put out there, you know, they were just
4 statements, you know. They weren't based on any fact; they were just
5 speculation as to what was happening at the brig. So at that point,
6 you know, Colonel Choike did not think it was a concern. But as I
7 told--you know, as I explained earlier with what happened earlier in
8 2010 and then additionally the increase of the phone calls that I was
9 getting, which he would not have been aware of that, you know, his
10 mailbox--the Commander's Mailbox was getting inundated with emails,
11 and the IG's office was getting inundated with phone calls, he
12 wouldn't have been aware that this was becoming an increasing
13 problem.

14 Q. When you say "Commander's Mailbox" do you mean Colonel
15 Choike's mailbox----

16 A. No.

17 Q. ----or General Flynn's mailbox?

18 A. Colonel Choike has his own personal email box that I think
19 is like Daniel.Choike.US--@USMC.mil. The Base Commander's mailbox is
20 basecommander, it goes directly to--which is--I have control over it,
21 he has access of it, so it's a separate email account.

22 Q. When you do your--as the inspector general, when you do
23 these investigations and inspections, do you do a broad range of

1 different divisions, how do you get any background expertise on the
2 particular areas that you are inspecting?

3 A. I pull SOPs. I pull--pull all the statutes--the regulations
4 that govern whatever it is that I'm being concerned and whatever it
5 is I'm looking into. And then I call the experts in the areas, you
6 know. You know, it would depend. You know, I mean, if there's a--
7 if--for instance, I had an inspection of the veterinary clinic, you
8 know. So I called up to--I think it was at the time Fort Belvoir--I
9 called up the--you know, the head of the veterinary department to get
10 some background information to help me do my investigation and
11 complete my report.

12 Q. What did you have for background for your investigations at
13 the brig?

14 A. I had the statute that was in there--I don't remember what
15 it was--one of the references, and then I had the SOP.

16 Q. I mean, did you have the Secretary of the Navy instruction?

17 A. That's correct. Yeah.

18 Q. That's what you--okay.

19 A. I'm sorry. I--I couldn't remember off the top--and then I
20 had the--the Brig SOP.

21 Q. I guess I'm going back again to that email that Mr. Coombs
22 showed you; 442A, that goes between a lot of people--Mr. Geoffroy--a
23 lot of people up at the H--at the Headquarters level.

1 A. Can I see that email, ma'am?

2 MJ: Yes, can I----

3 CDC[MR. COOMBS]: I'm handing the witness Appellate Exhibit

4 442A [handing the document to the witness].

5 WIT: Thank you. I'd like to take a quick second to read it--

6 MJ: Sure--please do.

7 WIT: ----just so I know.

8 [The witness reviewed the document.]

9 WIT: Okay.

10 Q. I guess--would anybody--I'm looking at all the cc's----

11 A. Sure.

12 Q. ----everybody on there, would anybody from your

13 Headquarters IG Office have been part of this or have been aware any

14 this level of interest is going on.

15 A. Let me--let me see--I--I know--I scanned it. I don't--I

16 never rece--I never saw this email----

17 Q. [Responded in the affirmative.]

18 A. ----so I would have not have seen it. I know most of the

19 players that are contained therein----

20 Q. [Responded in the affirmative.]

21 A. ----and if you look at the timing of this email, was the

22 same day--it was the same day I went actually and inspected the brig.

23 So they would--they would not have--they would not have been aware

1 that I had already done that at that point 'cause it started with
2 Major General--Major General Ary, which is the Staff Judge Advocate
3 of the Marine Corps. So they wouldn't have been aware that we were
4 already out in front of this in doing something. But there's nobody
5 throughout that--I don't see any name that would lead me to believe
6 that Headquarters IG had any knowledge of this.

7 MJ: Thank you. That is all I have. Does either side have any
8 follow-up based on that?

9 ATC[CPT VON ELTEN]: No, Your Honor.

10 CDC[MR. COOMBS]: No, Your Honor.

11 [The witness was permanently excused, was duly warned, and withdrew
12 from the courtroom.]

13 MJ: Are you ready to call your next witness or do you want
14 another recess?

15 TC[MAJ FEIN]: We're ready, ma'am.

16 MJ: Please go.

17 TC[MAJ FEIN]: Ma'am, the United States calls First Sergeant
18 Bruce Williams.

19 **FIRST SERGEANT BRUCE WILLIAMS, U.S. Army, was called as a witness for**
20 **the prosecution, was sworn, and testified as follows:**

21 **DIRECT EXAMINATION**

22 **Questions by the trial counsel:**

23 Q. First Sergeant, you are First Sergeant Bruce Williams of

1 Headquarters and Headquarters Company, U.S. Army Garrison, Fort Myer?

2 A. Yes, sir.

3 Q. First Sergeant, how long have you been an NCO in the United

4 States Army?

5 A. I've been an NCO for 15 years now, sir.

6 Q. And how long have you been in the Army?

7 A. 20 years, sir.

8 Q. And how about how long have you been the first sergeant of

9 your company?

10 A. Almost 30 months now, sir.

11 Q. 30 months?

12 A. Almost.

13 Q. And do you know Private First Class Manning?

14 A. Yes, sir.

15 Q. How do you know Private First Class Manning?

16 A. When he arrived in the area and--I--I became his first

17 sergeant then, sir, in 2010.

18 Q. Do you remember about what date that was?

19 A. Just--he arrived on July 28th, and I met him on July 29th.

20 Q. And how many times--estimation--have you visited with

21 Private First Class Manning since you first met him?

22 A. Altogether, both locations added, sir? Maybe----

23 Q. Any location that Private First Class Manning's been at

1 since in your company?

2 A. I'd say maybe 40 altogether.

3 Q. And what locations--well, what military locations have you
4 visited Private First Class Manning at?

5 A. Quantico and Fort Leavenworth.

6 Q. And when was your first visit to Quantico?

7 A. July 29th, 2010, around or about that day.

8 Q. And why did you go that day?

9 A. To introduce myself--let him know that I would be making--
10 the one being checks on him--myself and the commander, so he would
11 know who his leadership team was.

12 Q. Who else went with you that first visit?

13 A. Captain Casamatta, Lieutenant Colonel Leiker.

14 Q. And who was--or is or was Lieutenant Colonel Leiker at the
15 time?

16 A. Battalion commander.

17 Q. And what was the purpose--I guess--let me rephrase that.
18 What was the--the role that you felt you had as the first sergeant
19 with visiting Private First Class Manning?

20 A. To treat him just like I would any other Soldier handling
21 the well-being issues. Make sure--if he had any needs or concerns
22 that I would address them or our command team would address it for
23 him.

1 Q. And how would you describe your rapport with Private First
2 Class Manning?

3 A. Good rapport, sir.

4 Q. And why do you think that?

5 A. After we got to know each other, we were--the meetings went
6 a little more relaxed. Always professional. I never gave him any
7 reason to think he was being disrespectful or anything. It was good
8 meetings.

9 Q. And how long were your visits on average with him at
10 Quantico?

11 A. At Quantico; 15 minutes tops.

12 Q. What about at the JRCF?

13 A. Same, sir, 15 minutes.

14 Q. So you all would fly out to the JRCF?

15 A. Yes, sir.

16 Q. And--and how would you visit when you're at Quantico?

17 A. Drive.

18 Q. What type of visitation room did you meet Private First
19 Class Manning while at Quantico?

20 A. It was a booth, sir. He would be on one side of the glass
21 and I would be on the other.

22 Q. And were the Marines present when you were--Marine guards
23 present when you were dis--in discussions with him?

1 A. Yes, but outside the booth.

2 Q. And how do you know that?

3 A. Watched him every time, sir.

4 Q. Could you just explain for--for the court what--what you
5 mean, like what did you watch when you're sitting there in the booth?

6 A. I would just watch Marines--they'll be outside the door--
7 either closed or the door being slightly opened, but never inside the
8 room with us.

9 Q. They were or they were not inside the room?

10 A. They were not inside the room with us.

11 Q. Okay. And what was--what did you do during your visits.

12 A. I would go over checklists that was created to ensure we
13 captured certain items about his wellbeing.

14 Q. And what other type--general type of area as far as
15 specific areas did this checklist cover?

16 A. It covered any medical, dental issues, his meals, clothing
17 items, sanitary items, talked about visitation, telephone, recreation
18 time, talked about if he met with chaplain, counselors, and talked
19 about was the facility treating him professional, how was the guards
20 treating him. And at the end I would ask if there were any other
21 concerns I can help him with.

22 Q. And now specifically in some of those areas, what did
23 Private First Class Manning consistently say about the way he was

1 being treated by the guards at Quantico?

2 A. Professional or excellent.

3 Q. And about how often did he say that and--when you had these

4 discussions with him?

5 A. Every week.

6 Q. Now when you went through this checklist, did you go

7 through every question on the checklist?

8 A. Yes, sir.

9 Q. So you didn't skip any questions?

10 A. No, sir.

11 Q. Did Private First Class Manning answer the questions

12 beforehand at time?

13 A. After a while when--he pretty much memorized what I was

14 going to ask. But I still had to go through the motions.

15 Q. And what do you mean by "go through the motions"?

16 A. After I finished one question, he might get ready--he might

17 answer the next one for me as I'm--as I started reading it.

18 Q. And so then what would you do at that point?

19 A. I would shake my head--acknowledge his answer as I'm

20 finishing the sentence and do a checkmark.

21 Q. So you would--you would ask ever single question?

22 A. Yes, sir, even though pretty much knew what was coming

23 next, yes, sir.

1 Q. And that includes even the back second page of it where--of
2 the form were he talks about having a brig SOP and understand the
3 grievance process?

4 A. Yes, sir.

5 Q. And on--in addition to Private First Class Manning talking
6 about the guards, what did he say consistently about his treatment
7 overall by the facility at Quantico?

8 A. Professional.

9 MJ: You said what? Professional?

10 WIT: Professional.

11 MJ: Okay.

12 Q. How often did the accused raise issues or concerns about
13 his time at Quantico?

14 A. To me; twice.

15 Q. And what were those issues?

16 A. One he didn't understand how come he was on prevention of
17 injury. And the second time was when he actually used the grievance
18 process to see if he could come off of it.

19 Q. So going to the first one; when--when about was that?

20 A. After a few months after he first got there.

21 TC[MAJ FEIN]: Hold on. Your Honor, may I have a moment?

22 MJ: Yeah.

23 [Pause]

1 TC[MAJ FEIN]: Your Honor, I'm handing First Sergeant Williams
2 Enclosure 26 to Appellate Exhibit 259 [handing the document to the
3 witness].

4 Q. Do you recognize those documents, First Sergeant?

5 A. Yes, sir.

6 Q. And what are they?

7 A. These are the checklist records that I would take or one of
8 the command team would take every time we went on a visit.

9 Q. And who--who performed the majority of the visits for the
10 command team?

11 A. Me, sir.

12 Q. And then who else performed them in general if you weren't
13 there?

14 A. Captain Casamatta. If he was absent; acting commander--
15 Captain Varner now, but at the time she was a lieutenant. And we had
16 an acting first sergeant, Sergeant First Class Jones. And when
17 either one--one of--those team, we had Chief Winnimer [phonetic], who
18 was our XO--acting commander, also.

19 Q. And so going back to the question I asked you before, do
20 you, do you--and please feel free to use those documents to refresh
21 your memory, but when did--when, to the best of your knowledge did
22 Private First Class Manning first question his prevention of injury
23 status with you?

1 A. [Looking at the documents] 10 September, sir, 2010.
2 Q. 10 September 2010?
3 A. Yes, sir.
4 Q. And did you do when he--or what did he ask for--what did he
5 voice to you?
6 A. That he wasn't aware how come he was still on that type of
7 watch.
8 Q. And then what did you do when you were asked that question?
9 A. At the conclusion of our--our session, I just asked the--
10 the enlisted members of the brig how come he was still on it. They
11 pretty much gave me an explanation. And I asked Captain Casamatta
12 the same thing. He gave me an explanation. So I followed up with
13 PFC Manning the next week on what I was told of how come he was still
14 on that type of watch.
15 Q. And what were you told?
16 A. To prevent him from harming himself, sir.
17 Q. And when--and when you followed up with Private First Class
18 Manning the following week, what--did Private First Class Manning
19 have any other questions about that?
20 A. No, sir.
21 Q. But he never voiced any other concerns about changing the
22 status or--or having more clarification about the status?
23 A. No, sir.

1 Q. Now you mentioned there was a second time that Private
2 First Class Manning asked for assistance with his status change.
3 When was that?

4 A. [Looking through the document] It was in a January--it was
5 either in 2011--let's see here [looking through the documents].
6 [Pause]

7 A. I became aware of it on January the 14th of 2011.

8 Q. And what did you become aware of at that point?

9 A. That he had made a grievance on 7 January to figure out how
10 he can get off of prevention of injury.

11 Q. And--and that's what he told you?

12 A. Yes, sir.

13 Q. And what--what did you do about that once you were told
14 that?

15 A. At the conclusion of our session, I asked the warrant
16 officer in charge of the facility about his grievance and how come it
17 wasn't answered still for that week.

18 Q. Okay.

19 A. And he told me he would--he would answer it.

20 Q. And was it--was it answered the following week?

21 A. It was answered before I got back down there, sir.

22 Q. Okay, but was it the actual following week---

23 A. Yes, sir.

1 Q. ----or was it still open?

2 A. It was still open on the 14th, but before I got back down
3 there the next week it was already closed.

4 Q. Okay, so the following week, according to the forms, it was
5 closed out or was the question still pending?

6 A. [Looking through the documents.]

7 Q. And actually--I'm sorry. But I'll ask that question in a
8 moment. Did you use these forms every single time you went down?

9 A. No, sir.

10 Q. And why not?

11 A. Sometimes we would be out on the road and we'll notice that
12 we didn't have the sheet with us.

13 Q. But you'd still visit?

14 A. Yes, sir.

15 Q. Okay, what would you do when you didn't have this form?

16 A. I would still use the Quantico standard form and take an
17 additional piece of paper from them. And we'd still hit the items
18 that's on the checklist. And there were a few times where I did a
19 memorandum of record to cover the conversation.

20 Q. Okay. Thank you. And so going back to the question asked;
21 was the following week after that 14 January, had the question been
22 answered or was it still pending according to the form?

23 A. It had been answered, sir.

1 Q. It had been answered?

2 A. Yes, sir.

3 Q. Okay. And then what about the following week?

4 A. Nothing came about. Again, it just started to be

5 consistent; don't understand how come he was still on it.

6 Q. Okay. Were you ever asked at that point to assist with

7 making a change or was it just--explain for the court----

8 A. Never asked----

9 Q. ----what type of questions it was?

10 A. Hooah. Never asked to make a change--it was just when I

11 got to that portion of the check--check sheet, it would be a note

12 consistently that he didn't understand why.

13 Q. So why--if--starting in, you said, 10 September 2010, all

14 the way up and through including 14 January, if it consistently was

15 being checked "no"; he doesn't understand why, why didn't, I guess

16 you as a first sergeant or later company commander or anyone in the

17 chain of command, seek further clarification?

18 A. Did feel--for myself personally, I didn't feel there was

19 further clarification needed. It was just to ensure that he didn't

20 harm himself.

21 Q. Okay. And was that voiced to Private First Class Manning?

22 A. Just by me the first time. And then every week there would

23 consistently be a "no." So I just got the feeling that--although the

1 explanation was given, maybe it wasn't a good enough reason to him.

2 Q. Okay. But he never specifically made any requests during
3 that time for any additional information?

4 A. No, sir.

5 Q. What about any other types of requests for--for supplies,
6 clothing, food? Did you receive any other requests from Private
7 First Class Manning while you were there--or while he was at
8 Quantico?

9 A. Yes, sir. There was a time where he'll turn in laundry and
10 some items would be missing. So I'll address that with the facility
11 and he'll have them the next time--concerns about his uniform in
12 preparation for this. There were times when he wanted some sweats,
13 some sneakers, all this items that came back from the theater. We
14 handled some financial issues that he had--some previous travel
15 vouchers--and he wanted to see his LES--and dental.

16 Q. So would it be accurate to say that when you had--received
17 this certain request the command acted on it?

18 A. Yes, sir.

19 Q. And how did you all typically act on it?

20 A. As soon as possible. As soon as we did all the
21 coordinating and planning, everything was taken care of. And if it
22 was something minor like the clothing items, we just paid out of our
23 pocket just to get it done.

1 Q. And did you give the feedback--or did you give feedback to
2 Private First Class Manning based on accomplishing his request?

3 A. Yes, sir.

4 Q. Was it your feeling that he understood or knew if he asked
5 for something he--you all would execute to the best of your ability
6 to do it?

7 A. Yes, sir.

8 Q. How often did the accused raise other concerns such as need
9 for medical care?

10 A. Just after first--first getting to his--the facility, just
11 the general care. Then he had some prescriptions he needed to fill.
12 But after that, nothing much.

13 Q. And what did the chain--what steps did the chain of command
14 take in order to--or could you just explain for the court the steps
15 the chain of command took in order to move Private First Class
16 Manning such as--to Walter Reed or to a TDS office---

17 A. Oh, yes, sir.

18 Q. ----if needed?

19 A. Hooah. Whenever we were going to make a movement, we'll
20 make sure that we had properly trained personnel; chasers, for
21 escorting. We'll find out where the facility is. We'll do a recon'
22 of the area to make sure we know the route. We'll talk with law
23 enforcement to make sure that they--they were on board and they would

1 be able to escort us. We checked the--the entry points to ensure
2 that we gave them some dignity and respect and he wasn't put out on a
3 show as he was arriving to these areas. We checked with--if it was a
4 doctor or the dentist with them--to ensure that they'll be able to
5 see him even though, you know, he wasn't a member of that facility
6 because some areas have Tricare rules where they can't see people.
7 So we'll square away all that ahead of time. And, of course, we let
8 Quantico when we were coming so that they would have him prepared to
9 move out in a timely manner.

10 Q. And when--so as a practical example, for instance, use the
11 706 at Walter Reed, what type of specific coordination would you have
12 to do in order to decrease any--the public viewing of Private First
13 Class Manning shackled?

14 A. For the Walter Reed trip, we did the recon'. We had--we
15 knew he was going to be traveling through the city as it's--it's a
16 nice drive through D.C. to get there. We ensured that there was an
17 entrance that wasn't the main entrance so that he can get into the
18 facility--of course, with the dignity and respect; not being for
19 show. And the doctors already knew he was coming for the visit.

20 Q. And that same type of procedure with the recon's, the
21 tours, and the actual movements, both--that happened for locations at
22 Fort Belvoir?

23 A. For SCIF's?

1 Q. Sure.

2 A. Yes, sir.

3 Q. Or in Alexandria for SCIF's?

4 A. Yes, sir.

5 Q. Walter Reed? Fort Myer?

6 A. Yes, sir.

7 Q. Everywhere he moved?

8 A. Yes, sir.

9 Q. What concerns did you have, First Sergeant Williams, about
10 the way--or about the accused possibly being treated poorly by the
11 Quantico officials?

12 A. None, sir.

13 Q. And why?

14 A. Because every visit I felt that once I got to are there any
15 other concerns I can help you with, he would have told me.

16 Q. And you--did you--but you felt you had that rapport where
17 he would tell you that?

18 A. Yes, sir.

19 TC[MAJ FEIN]: Thank you, First Sergeant.

20 WIT: Yes, sir.

21 [The civilian defense counsel retrieved the documents from the
22 witness].

23 TC[MAJ FEIN]: Your Honor, Mr. Coombs retrieved Appellate--

1 Enclosure 26 to Appellate Exhibit 259.

2 **CROSS-EXAMINATION**

3 **Questions by the civilian defense counsel:**

4 Q. First Sergeant, the first time you--you documented your
5 command visit, at least on the forms in Enclosure 26 of Appellate
6 Exhibit 259, was on 19 August 2010, correct?

7 A. Can I see it, sir?

8 Q. You most certainly can.

9 A. Thank you, sir.

10 CDC[MR. COOMBS]: I'm handing back Appellate Exhibit--
11 Enclosure 26 of Appellate Exhibit 259 [handing the document to the
12 witness].

13 A. [Looking at the document] Yes, sir, first--first document.

14 Q. And that form--that was a form that you received from
15 Captain Haberland, correct?

16 A. Yes, sir.

17 Q. And you or a member of your command would visit PFC Manning
18 weekly using that form?

19 A. Yes, sir.

20 Q. And as you said, your visits would be in a no contact
21 booth?

22 A. Yes, sir.

23 Q. And you would ask the questions, PFC Manning would give you

1 a yes or no answer, and then you would check the box?

2 A. Yes, sir.

3 Q. And then to the right of the boxes, if you had other
4 detail, that's where you would write any details in the remarks
5 section?

6 A. Yes, sir.

7 Q. Now PFC Manning wouldn't be filling out these forms,
8 correct?

9 A. No, sir.

10 Q. Either you or someone from the command would?

11 A. Yes.

12 Q. And then occasionally--or for the most part, you would
13 some--have him sign the document after it was done?

14 A. All the time except once. Yes.

15 Q. Okay. And the first time that you--you say that PFC
16 Manning told you he did not understand why he was in POI was on 10
17 September 2010, is that correct?

18 A. Yes, sir.

19 Q. And on that day he told you that he had been following the
20 rules?

21 A. I don't remember that, sir.

22 Q. You remember him telling you that he didn't do or say
23 anything that would indicate that he was going to harm himself?

1 A. No, I don't remember that, sir.

2 MJ: When you're saying you "don't remember" are you saying you
3 don't--you just don't have a recollection of it or it never happened?

4 WIT: I have a recollection of having that conversation.

5 Q. Do you recall us talking about this and you saying that he
6 was telling you, hey, First Sergeant, I don't--I mean I'm not doing
7 anything to give them a reason to think I'm going to harm myself?

8 A. After the months of it going on, not that first time.

9 Q. Okay. So at some point you recall him saying, hey, I'm not
10 doing anything to give them a reason to harm myself?

11 A. Right. But not 10 September--yes, sir.

12 Q. Right. So on 10 September he just simply said I don't
13 understand why I'm on this----

14 A. Yes, sir.

15 Q. ----status?

16 A. Yes, sir.

17 Q. And you told him you'd look into it?

18 A. Yes, sir.

19 Q. And that's when I--you went and spoke to Master Sergeant
20 Papakie, is that correct?

21 A. I can't recall who I spoke to that day.

22 Q. Was it an enlisted person you spoke to?

23 A. It was an enlisted person.

1 Q. And did--was it a senior enlisted or junior enlisted?
2 A. Senior enlisted.
3 Q. And when you spoke to that person he basically just told
4 you that they considered PFC Manning to be a risk of self-harm?
5 A. Yes, sir.
6 Q. And that was all they told you really?
7 A. No, sir.
8 Q. What else did they tell you?
9 A. To make sure he didn't hurt himself was the reason that he
10 was on that type of watch.
11 Q. Okay. And that's what they told you then?
12 A. Yes.
13 Q. Now after speaking with this senior enlisted person, you
14 went back to PFC Manning and you told him what you learned?
15 A. After the--during the next visit.
16 Q. And during that next visit you told him that that--you
17 know, the Quantico facility just considered him to be a risk of self-
18 harm?
19 A. Not the same words, but that--they wanted to ensure that he
20 didn't hurt himself.
21 Q. Okay, so you told him they had him in this condition
22 because they didn't--they wanted to ensure he would not hurt himself?
23 A. Yes, sir.

1 Q. Now you didn't have the authority to order PFC Manning's
2 status to be changed, correct?

3 A. No, sir.

4 Q. And you let PFC Manning know that obviously you didn't have
5 the authority to change his custody status?

6 A. No, sir.

7 Q. "No, sir," you didn't let him know or----

8 A. I didn't let him know that.

9 Q. So did you tell him that you could change his custody
10 status?

11 A. No, just that I would look into a reason for why he was
12 still on that status?

13 Q. All right. But obviously he's in a Marine brig?

14 A. Yes, sir.

15 Q. And you're Army?

16 A. Yes, sir.

17 Q. So it's safe to assume that he knows that you don't control
18 the Marine brig?

19 A. Yes, sir.

20 Q. Now you--you--you do have the ability to do certain things
21 as the first sergeant. And that is to ensure he's in proper uniform?

22 A. Yes, sir.

23 Q. To make sure he has shoes if he needs shoes?

1 A. Yes.

2 Q. And he's getting dental care if he needs dental care?

3 A. Yes.

4 Q. And those are the things that you, the command, could
5 control, right?

6 A. Yes.

7 Q. Now on 17 September, 23 September, and 30 September, PFC
8 Manning continues to tell you he does not understand why he's on POI.
9 Do you continue to tell him it's just because the brig wants to
10 ensure he doesn't harm himself?

11 A. [Looking through the documents] No, sir.

12 Q. What do you tell him when he's telling you, no, I don't
13 understand why I'm still on POI?

14 A. After explaining it the first time, once we would get to
15 that portion, there was just a standard, no, and we would move onto
16 the next question.

17 Q. And you indicated that at least in the subsequent occasions
18 that's when he started telling you, hey, First Sergeant, I'm still
19 not doing anything to give them a reason why. I'm still being
20 respectful, still doing everything I should be doing.

21 A. That came once I found out he did the grievance months
22 later.

23 Q. All right. So the first time he says that is in----

1 A. January----

2 Q. ----2011?

3 A. ----yes, sir.

4 Q. All right, so during these times periods then in 2010, he's

5 saying, First Sergeant, I don't understand why, but there's no

6 conversation between the two of you about it?

7 A. Right, 'cause it was--if I could do this--[reading from the

8 document] do you understand why you're on sui--suicide watch or

9 prevention? The--no. When was the last time you saw a doctor,

10 therapist or counselor--we'd go to the date--it wasn't----

11 Q. And why----

12 A. ----an area for explanation at that point.

13 Q. Okay, why as the first sergeant--why didn't you think that

14 at that point when he's saying "no" that you needed to go into more

15 detail with him or go back to a facility and--and get them to give

16 you a better answer?

17 A. I was considering to be like when my--my son, who's 16, he

18 has a driver's permit and he wants to borrow my car. I know he can

19 drive, but--he say, hey, Dad, let me get the car. You know I can

20 drive. I'm like no you can't have it 'cause it's illegal. But he

21 still asks me all the time. So I considered it to be, hey, you have

22 your explanation, however, you still don't understand why.

23 Q. Okay. So at this point then, if I understand you

1 correctly, PFC Manning knew that the facility was going to keep him
2 in this condition because they believed--they didn't want him to do
3 anything to harm himself?

4 A. Yes, sir.

5 Q. And in addressing it with you that was the answer he got
6 and both of you knew that's the answer that you got?

7 A. Yes, sir.

8 Q. Now starting in October--on 7 October 2010, you checked
9 "yes"--that's Page 19 of 87--to that question "Do you understand why
10 you're on suicide watch or injury prevention." Do you know why you
11 checked "yes" on that--on that occasion?

12 A. [Looking at the document] He responded with a "yes", sir.

13 Q. And do you know--did you talk about that at that point?

14 A. No, sir.

15 Q. So you see that the "yes" is checked again on 13 October
16 and 21 October. And I guess other than PFC Manning responding "yes"
17 to that do you know why that was a "yes" now that he understands the
18 why he's on suicide watch or injury prevention?

19 A. Other than as excepted [sic] in my first response, no, sir.

20 Q. If you look to Page 27 of 87, that's when one of the other
21 command members, Sergeant First Class Jones does the visit. And he
22 checks "no" to that question. And he also notes that PFC Manning's
23 been on POI for 90 days. Do you know why ----

1 TC[MAJ FEIN]: Your Honor, I'm sorry to interrupt, but that's
2 not Page 27.

3 WIT: 29 [looking at the document].

4 CDC[MR. COOMBS]: 29? Okay.

5 Q. 29 of 87. Do you know why he indicated no at that point?

6 A. No, sir.

7 Q. Was that ever brought up to--to you as the first sergeant?

8 A. I was away at a different installation.

9 Q. I'm sorry.

10 A. So--he never--I was away at a different installation. So
11 he might have addressed it with the commander.

12 Q. Now on 10 November, Chief Winnimer con--conducts the visit.
13 And he checks "no" to, again, the question of whether or not PFC
14 Manning understands if he's on--why he's on suicide or prevention of
15 injury. Do you see that?

16 A. [Looking at the document] He--he was checking "no" in an
17 area saying "no" that PFC Manning was not on either. So that was an
18 incorrect entry right there.

19 Q. Right. So that's not valid 'cause you know he was still on
20 prevention of injury at this point, right?

21 A. Oh, yes, sir.

22 Q. Now if you--if you look then at the 18 November 2010 entry--
23 -I believe that's on Page 33, but verify for me--of 87.

1 A. [Looking at the document] Yes, sir.

2 Q. Is that Page 33?

3 A. Yes.

4 Q. And it goes back to checking "yes" in response to do you

5 know why you're on suicide or injury prevention. Do you know why or

6 do you recall why?

7 A. Just standard questions and giving a yes or no answer from

8 him.

9 Q. Okay. Then we--the forms not used for the 26 November

10 visit, correct?

11 A. [Looking through the documents] Correct.

12 Q. But it does--and it does not appear to me at least looking

13 at that, that that question is covered. Do you see that question

14 being covered?

15 A. Well what I wrote in my own handwriting on that day was

16 [reading from the document] still on injury prevention and he knows

17 why.

18 Q. All right. If you go down----

19 MJ: But what page are we on with this now?

20 WIT: 35 of 87.

21 CDC[MR. COOMBS]: 35 of 87, ma'am.

22 MJ: Got it. Go ahead.

23 Q. So do you know why you would--you would write that?

1 A. Because PFC Manning and myself--if I forgot the checklist,
2 we would go down things that we could remember. And that's what made
3 me write that, sir.

4 Q. Okay. So then if you go to 10 December, and--and pretty
5 much for the rest of December; the 10 December, the 14 December, and
6 23 December, each one of those is checked--two of them by Sergeant
7 First Class Jones and one by you--that PFC Manning does not
8 understand why he's on injury prevention. During this time period do
9 you recall why that would be the case?

10 A. [Looking at the documents.] No, sir.

11 Q. If you go to Page 47 of 87, you see that that's--on 5
12 January 2011, Captain Casamatta conducts the visit, correct?

13 A. [Looking at the document] Yes, sir.

14 Q. And PFC Manning tells him that he doesn't understand why
15 he's on POI?

16 A. [Looking at the document] I can't tell with the--the copy
17 is saying though on this one.

18 Q. Did Captain Casamatta ever tell you that--and I believe
19 it's documented there--that he would speak to the Master Sergeant
20 about why?

21 A. He didn't tell me, sir. No, sir.

22 Q. Do you know if Captain Casamatta spoke to Master Sergeant
23 Papakie about this?

1 A. Yes. He spoke with him--I'm assuming he's the same one I
2 talked to the day I asked. But he spoke with him at that time, also
3 ----
4 Q. And ----
5 A. ---- about--and received the same type of answer.
6 Q. Just that they ----
7 MJ: This is what ----
8 Q. ---- did ----
9 MJ: ---- this is what timeframe?
10 CDC[MR. COOMBS]: 5 January 2011, ma'am.
11 Q. That, again, that they just didn't want PFC Manning to harm
12 himself, and that's why they had him in that condition?
13 A. Correct, sir.
14 Q. If you go now to Page 49 of 87, that's your 14 January 2011
15 visit, is that correct?
16 A. [Looking at the document] Yes, sir.
17 Q. Now on that day PFC Manning tells you apparently--or either
18 this visit or a previous one where he's still not doing anything to
19 be on POI, correct?
20 A. Correct.
21 Q. And he tells you, hey, I'm--I'm doing everything I'm
22 supposed to be doing?
23 A. Correct.

1 Q. And he notifies you that, hey, I even filed a grievance
2 with the Brig Commander but I haven't heard anything back from him?
3 A. Correct.
4 Q. And you asked him, okay, when'd you file it? And he tells
5 you 7 January?
6 A. Correct.
7 Q. And you actually document that on the form, do you not?
8 A. Yes, sir.
9 Q. And when you hear that he hasn't heard back based upon his
10 DD 510 complaint you're surprised?
11 A. Yes, sir.
12 Q. You're surprised because a week has gone by?
13 A. Yes, sir.
14 Q. And you tell him, hey, I'm going to look into that issue,
15 and I'll talk to the warrant myself?
16 A. Yes.
17 Q. And you did, in fact, approach Chief Averhart and you asked
18 him about that?
19 A. I don't remember the chief's name, I'm sorry. But I
20 remember the faces all the time.
21 Q. It was a warrant officer though, right?
22 A. Yes, sir.
23 Q. And he was the Brig OIC?

1 A. Yes, sir.

2 Q. So you go up to him and you say, hey, look, I'm hearing
3 that PFC Manning has filed a DD 510 grievance form with you and you
4 haven't responded back to him yet?

5 A. Yes, sir.

6 Q. And he doesn't look at you like he doesn't know what you're
7 talking about?

8 A. No, sir.

9 Q. In fact, he says, yeah, I'm going to--I'm going to respond
10 to him?

11 A. Correct.

12 Q. And he says that the response is going to be that his
13 request to be removed is going to be denied?

14 A. He didn't respond to me of what the decision would be.

15 Q. What did he say to you?

16 A. He told me he was going to give him a response.

17 Q. All right. So he didn't convey that that would be in a
18 negative?

19 A. Correct, sir.

20 Q. All right. So--and this was on 14 January, correct?

21 A. Yes, sir.

22 Q. Now from that point forward if you--you see pretty much 21
23 January, 28 January, 4 February, 11 February, 25 February, 2 March,

1 PFC Manning continually says I don't understand why I'm on POI.

2 A. [Looking at the document] Yes, sir.

3 Q. And based upon the previous responses you got from the

4 brig, you don't really do anything to follow-up on that at this

5 point, right?

6 A. Correct.

7 Q. 'Cause they're--as the first sergeant do you believe

8 there's anything you can do to get PFC Manning off of POI?

9 A. No, sir.

10 Q. Now on 11 March--that's Page 73 of 87, you note that PFC

11 Manning does--still does not understand why he's on POI, but you also

12 note that he tells you about increased restrictions of being required

13 to basically wear a suicide smock at night?

14 A. [Looking at the document] Correct.

15 Q. And at that point are you aware that he's having to

16 surrender his underwear too?

17 A. No, sir. And I didn't know about the smock until that day.

18 Q. All right. And when you hear about that what did you do,

19 if anything?

20 A. After--he didn't give me a reason that he was wearing the

21 smock. But after the session I asked the facility personnel what

22 caused them to require that.

23 Q. And what did they tell you?

1 A. That he made some comments that--some words to the effect
2 of all he had to do was such and such to hurt himself. But they
3 didn't tell me specifically what he said he could do.

4 Q. All right. And did you follow that up with PFC Manning to
5 ask him about what he said?

6 A. No, sir.

7 Q. Now on 18 March, 23 March and 31 March, again, PFC Manning
8 tells you he does not understand why he's on POI?

9 A. [Looking at the documents and no response.]

10 Q. During that time period do you know if you re-approached
11 the brig to find out why he's still on POI?

12 A. I never did, sir.

13 Q. Now we don't have any command forms for April of 2011, do
14 you know why?

15 A. [Looking at the document] April 2011 we--well, I know I
16 myself and a few others of the command team were TDY for a few weeks
17 at Fort Lee, Virginia. And I cannot who was sitting in my seat then.

18 Q. Okay. Now PFC Manning is eventually transferred from
19 Quantico to the JRCF on 20 April 2011, is that correct?

20 A. [Looking at the document] I can't confirm that date, sir,
21 off my head.

22 Q. All right. But he's event--he eventually goes to the JRCF,
23 correct?

1 A. Yes, sir.
2 Q. And your command visits continue there?
3 A. Yes, sir.
4 Q. And at the JRCF you notice a change in PFC Manning,
5 correct?
6 A. Yes, sir.
7 Q. You notice that he's happier?
8 A. Yes, sir.
9 Q. He's more talkative?
10 A. Yes, sir.
11 Q. And, in fact, you also note that he's not on MAX or POI?
12 A. Correct, sir.
13 CDC[MR. COOMBS]: Thank you, First Sergeant.
14 WIT: You're welcome, sir.
15 MJ: Redirect?
16 TC[MAJ FEIN]: Yes, Your Honor.

17 **REDIRECT EXAMINATION**

18 **Questions by the trial counsel [MAJ Fein]:**

19 Q. First Sergeant, first, in reference to a line of
20 questioning when it deals with you being part of the Army command and
21 reference PFC Manning being housed in a Marine facility; if you'd
22 felt that Private First Class Manning's health and welfare was having
23 a detrimental effect, could you have done something as his Army first

1 sergeant?

2 A. Any--anytime I knew of any concern, I immediately went to
3 the commander. So if it was something that was really bad--you know,
4 a bad situation for him, of course, I would have taken it to Captain
5 Casamatta and we would have went higher to either have him placed
6 somewhere else or someone who could take action there at the facility
7 to change the accommodations.

8 Q. So at no point did you feel that--that you had no recourse
9 if it did get that bad with the Marines?

10 A. No, sir, never.

11 Q. Also, just a point of clarification for the court; on 14
12 January when Private First Class Manning was discussing with you the
13 grievance, did he tell you specifically--if you remember--that he
14 filed a grievance or that he filled a DD 510?

15 A. Grievance. I didn't know the form number.

16 Q. Okay. Do you even know what a DD 510 is?

17 A. No, sir. I just assumed from today that that's the
18 grievance form.

19 Q. So you never even heard DD 510 before?

20 A. No, sir.

21 Q. Have you heard the term "chit" before?

22 A. No, sir.

23 Q. C-H-I-T?

1 A. No, sir.

2 TC[MAJ FEIN]: Thank you.

3 **REXCROSS-EXAMINATION**

4 **Questions by the civilian defense counsel [Mr. Coombs]:**

5 Q. First Sergeant, with regards to going to higher level
6 command, are you aware whether or not Captain Casamatta ever brought
7 this issue up to his battalion commander or Colonel Coffman?

8 A. I'm not aware of that, sir.

9 Q. So you--you hadn't received any information that Captain
10 Casamatta might have brought this concern up to echelons above him?

11 A. I'm not aware of that, sir.

12 CDC[MR. COOMBS]: All right. Thank you, First Sergeant.

13 WIT: Your welcome.

14 TC[MAJ FEIN]: No, Your Honor.

15 MJ: All right. I just have a couple.

16 **EXAMINATION BY THE COURT-MARTIAL**

17 **Questions by the military judge:**

18 Q. First Sergeant, going back to the question that trial
19 counsel just asked you about the 14th of January, there's a whole
20 series of questions about the inmates' grievance procedures. What
21 did you understand that block to mean?

22 A. Your Honor, I understood it to mean that he--he was briefed
23 on the procedures. He received a handbook that--at the conclusion of

1 the briefing he understood that while his stay--while during his stay
2 if he had any concerns he can address it with them and they'll give
3 him an answer to his concerns.

4 Q. The following week you have a--on the 20th, you have a
5 star--it says that--you have the handwritten questions, it says
6 [reading from the document] same grievance pending with a big star.
7 Why and how was this implemented? Is that your writing on that one?

8 A. Yes--yes, Your Honor.

9 Q. Why is that starred like that?

10 A. The--there was a change in his question of how was it
11 implemented instead of how can he come off. So I asked the facility
12 about that. And they said ever since his entrance there he was under
13 prevention of injury instead of he came there and it was changed to
14 prevention of injury. It just stayed that way consistently.

15 Q. When you had these command visits, how was the
16 communication between you and PFC Manning?

17 A. Always professional. I'll ask the questions, he'll give me
18 a response. And sometimes at Quantico he might have a--a counseling
19 session or something. So--'cause I could arrive at any time. So I
20 might have to go a little quicker or--once I got to the Fort
21 Leavenworth facility, depending on my flight time or if they--they
22 were saying it's lunch time or so forth, it'll go fast. But if no
23 flight or counseling time was the case during out discussion I'll

1 probably do the checklist and then just talk about anything else.

2 But always professional at Quantico.

3 Q. When you were at Quantico did you ever--did your discussion
4 ever go beyond this question and answer on the checklist--did you
5 talk about anything else?

6 A. We talked about a car accident one time that was--I think
7 in his hometown. And that was about it, ma'am.

8 Q. Did he initiate conversation with you or did everything go
9 one-way from you to him?

10 A. I always initiated the discussion. And I also initiated
11 the one about the car accident 'cause I knew he was from there so I
12 asked him if he knew about it.

13 Q. Did you feel that PFC Manning was reluctant to talk to you?

14 A. No, Your Honor.

15 Q. Did his demeanor change over time while the time he was at
16 Quantico or was it pretty consistently all the way through?

17 A. Consistent all the way through except the time he told me
18 he was a smock--he wasn't--he's a little more--I guess more stern
19 that day. He just had a sterner look on his face that day. Usually
20 he was a little more relaxed--still professional, but that day he
21 just looked bothered.

22 Q. When you say "stern" just describe it the best you can?

23 A. Like that--if I could do the facial expression--but ----

1 MJ: Let the record reflect the witness is making a stern facial
2 expression.

3 A. Let's see, usually there's a relaxed facial expression, but
4 I could see there was a few muscles being used to--to make his face
5 look a little different once we got to that area.

6 Q. Did he appear pleased or displeased that he was wearing the
7 suicide smock?

8 A. Displeased.

9 Q. What else did he say about it other than he was wearing it?

10 A. That day he didn't tell me what was the cause for him to
11 wear it. But I received a--I was under the perception that he didn't
12 do anything out of the normal to cause it just by the way he--he told
13 me, hey, I'm wearing this smock at night.

14 Q. And he never said why?

15 A. He never told me why.

16 Q. And how did you learn about the underwear comment?

17 A. I asked some of the enlisted personnel of the facility once
18 our session was over.

19 Q. Did you ever ask PFC Manning why he was ----

20 A. No, Your Honor.

21 Q. ---- wearing the smock?

22 A. No.

23 Q. After that session--was it 7 March or something around

1 then--after that session did that stern demeanor continue?

2 A. No, they stopped using the smock. So it stopped.

3 Q. When did they stop using the smock?

4 A. I can't confirm, ma'am--Your Honor. I'm--that could have
5 been the last day--the day I was there--or it could have went on a
6 day or two after. It wasn't being used by the time I did my next
7 visit.

8 Q. Okay, just to make sure I understand this, your 11 March
9 visit--I'm sorry--there was a smock, and then your 18 March visit
10 there was no more smock?

11 A. Right, Your Honor.

12 Q. How did you know that?

13 A. During my next visit once we got to that area--well,
14 actually I found out when I got there that he wasn't wearing it
15 because I asked the facility personnel. And when we got to that
16 area--I'm--I'm quite sure he would have told me that he was still--
17 still wearing it.

18 Q. So the facility personnel told you on the 18th of March
19 that he wasn't wearing the smock anymore?

20 A. Correct. 'Cause I came in--I usually do--I have to come
21 in--I sign in, give them my ID and so forth. And I'll just say a few
22 words to a few people--ask them how are things.

23 Q. And was that the last discussion you had of any smocks

1 after that with anybody?

2 A. Yes, Your Honor. And I never mentioned the smock to PFC

3 Manning during that session that day.

4 Q. On the 18th?

5 A. On the 18th.

6 MJ: Any follow-up based on that?

7 TC[MAJ FEIN]: Just looking through--one moment, please, Your

8 Honor.

9 MJ: Yes.

10 [Pause]

11 TC[MAJ FEIN]: No, Your Honor.

12 CDC[MR. COOMBS]: No, Your Honor.

13 **[The witness was permanently excused, was duly warned, and withdrew**

14 **from the courtroom.]**

15 MJ: Okay, what is remaining?

16 TC[MAJ FEIN]: Ma'am, for tonight what's remaining is calling

17 Captain Casamatta, the company--the previous company commander. The

18 United States requests a 15 minute recess.

19 MJ: That's fine. What about Colonel Coffman?

20 TC[MAJ FEIN]: Your Honor, at this time the government does not

21 intend to call him, but would like to reserve final decision until

22 after Captain Casamatta's testimony.

23 MJ: All right. And how long of a recess do you want?

1 TC[MAJ FEIN]: 15 minutes, Your Honor.
2 MJ: Okay, defense, any--anything?
3 CDC[MR. COOMBS]: No objection, Your Honor.
4 MJ: All right, court is in recess until 1655 or 5 minutes to 5.
5 [The Article 39(a) session recessed at 1641, 10 December 2012.]
6 [The Article 39(a) session was called to order at 1705, 10 December
7 2012.]

8 MJ: The Article 39(a) session is called to order. Let the
9 record reflect all parties present when the court last recessed are
10 again present in court. Yes?

11 TC[MAJ FEIN]: Ma'am, the United States calls Captain Joe
12 Casamatta.

13 CAPTAIN JOE CASAMATTA, U.S. Army, was called as a witness for the
14 prosecution, was sworn, and testified as follows:

15 DIRECT EXAMINATION
16 Questions by the trial counsel [MAJ Fein]:

17 Q. You are Captain Joe Casamatta, currently of First Army
18 Division, East?

19 A. I am.

20 Q. And how long have you been in the Army, Captain Casamatta?

21 A. I've been in the Army for just over 16 years, sir.

22 Q. And how long have you been an officer?

23 A. I've been an officer just over 6 years, sir.

1 Q. And before becoming an officer what was your last position
2 and rank?

3 A. I was a platoon sergeant at Fort Sam Houston.

4 Q. And what was your rank?

5 A. I was a staff sergeant (promotable).

6 Q. And when were you company commander of Headquarters
7 Company, U.S. Army Garrison, Fort Myer?

8 A. I was company commander from January 2010 until July of
9 this year.

10 Q. And what were the general responsibilities of your company
11 and the personal in your company?

12 A. Well the HHC, USAG has about two thousand Soldiers in it.
13 And our responsibility primarily were UCMJ actions for those
14 Soldiers--and--basically in the National Capital Region, but we had
15 Soldiers all over the world to include every embassy.

16 Q. And do you know Private First Class Manning?

17 A. I do.

18 Q. How do you know him?

19 A. I know him because he's a Soldier that was under my
20 command.

21 Q. And when did he join your command?

22 A. He came to us in--excuse me, I can't remember the exact
23 date, but it was--I believe July of '10.

1 Q. Of 2010?

2 A. Of 2010.

3 Q. And where did you first meet with him?

4 A. I first met with him in Quantico Brig.

5 Q. And about how many times while he was still at the Quantico

6 Brig did you meet with him personally?

7 A. While he was at Quantico, I would say 10 times--that's a

8 rough estimate.

9 Q. And how often did someone from your command--a leader from

10 your command meet with him?

11 A. Well, our goal was every other week to meet with him. We

12 tried for more--to meet with him more. Sometimes it was every third

13 week. But typically every other week was our general mark.

14 Q. And what was the purpose of your--direction to have someone

15 meet with him every other week?

16 A. The purpose to meet with Private Manning was to make sure

17 he was being taken care of appropriately and to make sure if he had

18 any needs they were being taken care of.

19 Q. And did you use a checklist for that?

20 A. We did use a checklist.

21 Q. And how did you develop that checklist?

22 A. The checklist was given to us by Captain John Haberland.

23 Initially the checklist was a little bit different than the one that

1 we have today.

2 Q. And so how--how--how did you develop the final one that
3 your command started using and still use today?

4 A. The checklist that--that he had given us, I guess, had been
5 used in different--in the Army in different capacities. So we simply
6 formatted it specifically to--around the needs that we have for this
7 particular Soldier.

8 Q. During your visits how would you describe Private First
9 Class Manning and your direct rapport?

10 A. I believe we had a good rapport?

11 Q. And why?

12 A. We had several conversations--not just about the checklist,
13 but we talked--every time I went to visit him we spoke.

14 Q. And--and your conversations weren't just about the
15 checklist?

16 A. No. No they were not.

17 Q. Do you remember any specific topics or general topics that
18 you all discussed outside of the checklists?

19 A. Yes. We spoke of his family. We spoke of the area--the
20 general area and--where he's from. We spoke a lot about sports.
21 Most of our conversations were focused around sports.

22 Q. Now going back to the actual checklists, to the best of
23 your knowledge how would you summarize how Private First Class

1 Manning described his treatment by the guards at Quantico?

2 A. Professional was a use--a word that he used on a regular
3 basis.

4 Q. And what about how the facility as a whole treated him?

5 A. Again, the word professional was used the vast majority of
6 the time.

7 Q. How often did Private First Class Manning raise issues or
8 concerns about his pretrial confinement at Quantico?

9 A. Infrequently.

10 Q. And what were the issues that he did mention infrequently?

11 A. The issues that he raised were being on increased status
12 prevention of injury and then suicide--prevention of suicide.

13 Q. What about any other needs or wants while he was there?

14 A. There was a couple of--of needs for basic sundry items.
15 Although the shaving kit and that kind of stuff was taken care of,
16 there was also some clothing issues; some shoes and some PTs, nothing
17 major. Most of the stuff he had already had--they had brought with
18 him out of theater.

19 Q. And so--before we go into any other further details, could
20 you explain, please for the court, how did your typical meeting go as
21 far as your interaction with the facility, Private Manning, the
22 visitors' booth, et cetera?

23 A. Well, do you want me to start at the beginning, sir? Or---

1 -

2 Q. Sure. Please walk--walk the court through--when you showed
3 up--in general.

4 A. Yes, sir. Ma'am, the typical meetings--the first time we
5 had boots on ground, I brought my Battalion Command and Command
6 Sergeant Major and my First Sergeant down to Quantico so we could
7 meet with the Soldier and we could meet with the staff and find out
8 exactly where he was going to be staying. We were greeted and--and
9 we did a full round of the facility--checked out everything in the
10 area. And then we met with the Soldier. From that point on, after
11 the Sergeant Major had talked to the Soldier, every meeting went
12 pretty much the same as far as the checklist goes. It's a series of
13 questions--yes or no questions--and a few of them require actual
14 explanations in 'em to check on his health and welfare.

15 Q. And so if there was an issue such as you mentioned socks
16 and sweat pants, what did--what did your leadership under your
17 command do with--with those issues?

18 A. With a--a few things like shoes, I just purchased--I mean
19 it was no big deal, it's just a pair of shoes--and a few other
20 things. Magazines, for example, I--I want to know if he was allowed
21 to read magazines--if he was, you know, as far as receiving books go,
22 and if they had any kind of library system for him or anything like
23 that. So most of the stuff was just easily--more easily purchased

1 than--than going through our supply system to provide that stuff for
2 him.

3 Q. And if requested for that material would you consult with
4 the brig?

5 A. Yes to make sure it wasn't contraband or anything like
6 that? Absolutely, sir, yes.

7 Q. And what did--so now going back to his status in
8 confinement.

9 A. Yes.

10 Q. What did Private First Class Manning bring up about his
11 concerns or confusion about his status?

12 A. Well, again, he brought up the fact that he was on
13 prevention of injury status. And he wasn't sure why he was on that
14 status.

15 Q. And do you remember when he first brought that up to a
16 member of the chain of command?

17 A. I cannot recall off the top of my head.

18 Q. Was it before or after the New Year?

19 A. It was before the New Year.

20 Q. Before or after Thanksgiving?

21 A. I would say right around Thanksgiving. Maybe--maybe after,
22 but I truly do not recall.

23 Q. And when it was first brought up what did you do as a

1 company--or, first, was it brought up to you or a subordinate?

2 A. It was brought up to me from----

3 Q. And--and--one--I'm sorry. Go ahead.

4 A. ----from my First Sergeant.

5 Q. Okay, so once the First Sergeant brought it up to you what
6 did you do as the company commander with that information?

7 A. Well the first thing I did since I was in my office when he
8 told me is I let my--the Battalion Command Sergeant Major and the
9 Battalion Commander know. And then I spoke to the Brig NCOIC at the
10 time, Master Sergeant Papakie, about it. And then I went out to
11 Quantico to speak to the Chief Warrant Officer-In-Charge.

12 Q. And what did they--what information did you glean from this
13 talk--talks you had with them?

14 A. Well from the brig personnel that--that the status was
15 increased to make sure he didn't hurt himself or anybody else. To
16 make sure that he was being kept safe for lack of a better term.

17 Q. And--and once you received a response from the brig
18 officials did you--did you relay that back to Private First Class
19 Manning?

20 A. We spoke it about it at the next checklist--at--yes, at the
21 next meeting that I had with him.

22 Q. So do you know why the accused continued to not understand
23 why he was on POI status?

1 A. I do not know.

2 Q. How often did Private First Class Manning raise other
3 concerns such as need for medical care?

4 A. He did not.

5 Q. He never asked for dental or medical care?

6 A. No.

7 Q. To you or to your--to like the First Sergeant or others?

8 A. Nothing was ever brought to my attention. I knew he--he
9 had a medical--he had a dental appointment and then a 706 board,
10 which as at an off-site facility. But every time he was asked, you
11 know, the medical questions, he never had any medical concerns.

12 Q. Okay, so would he be accurate to say that when--if your
13 subordinates, including First Sergeant, could not deal with an issue
14 on their own they'd bring it to your attention personally?

15 A. Absolutely.

16 Q. Did you bring any issues to the attention of your seniors;
17 your Battalion Commander or your Garrison Commander, Colonel Coffman?

18 A. I did.

19 Q. And what did you bring to their attention?

20 A. Specifically the two--the two issues. Number one, the
21 increased--the status of prevention of injury, and then the suicide--
22 increase to suicide prevention status.

23 Q. And what was the purpose of bringing it to their attention?

1 A. Well, again, both of them were brought to their attention
2 because it was a change in the Soldier's status.

3 Q. Were you asking for assistance to--to--to make a change
4 with the brig?

5 A. During the prevention of suicide, I was asking for
6 assistance because the--it wasn't moving--I needed the information to
7 why he was changed to an increase of suicide status. And I did not
8 receive the--at that time the appropriate feedback from the brig.

9 Q. Okay, then what----

10 MJ: What timeframe are we talking about?

11 WIT: Ma'am, this would have been around a month before they
12 moved him from that facility in Quantico. I could be off on my date
13 though.

14 TC[MAJ FEIN]: Your Honor, may I have a moment?

15 MJ: Yes.

16 [Pause]

17 TC[MAJ FEIN]: Your Honor, I'm handing Captain Casamatta
18 Enclosure 26 of Appellate Exhibit 259 [handing the document to the
19 witness].

20 Q. Do you recognize these, Captain Casamatta?

21 A. I do, sir.

22 Q. What are they?

23 A. Sir, these are the checklists that we use at this time when

1 we were visiting the brig at Quantico.

2 Q. Okay. Could you please look through there and--to make
3 this easier, either look in the January or the March timeframe of
4 2011 and see what the date is of the event or around the date you're
5 talking about.

6 A. [Looking through the documents] Ah, yes. Okay. Sir, I've
7 ----

8 Q. And what's the date?

9 A. ---- I've got the 14 January 2011 checklist in front of me.

10 Q. And so is--is--so what would you estimate the date is of
11 when you reached out to your chain of command for assistance?

12 A. It would--it was as soon as First Sergeant let me know that
13 this was an issue. So it was either the 14th or early on the 15th,
14 sir.

15 Q. Okay, and then what was--so what--again, explain to the
16 court what the purposes of you going to your senior chain of command?

17 A. To inform them that there was a change in his status.

18 Q. Okay, and then--but did you need assistance? Were you
19 asking--I think this is confusing from what you just said. Was it
20 that you needed assistance to effecting the change to the status or
21 was it to inform them?

22 A. It was to inform them at this time, sir.

23 Q. Okay. Did you ever at any point, that time or any time,

1 need assistance in having his status changed?

2 A. I did not need assistance with that, no.

3 Q. Okay. Why not?

4 A. Because I--at the time I didn't feel that--that it was

5 necessary, sir.

6 Q. Why?

7 A. I'm sorry, sir, I don't understand.

8 Q. Well, you just--you just answered at the time you did not--

9 --

10 A. Yes.

11 Q. ----feel it necessary. Why did you feel at the time it

12 wasn't necessary?

13 A. Because the--the brig had there SOP that they were going

14 off of. And that's--that's what they did, sir. I didn't feel it

15 necessary to intervene in what they were doing, sir.

16 Q. Okay, so after First Sergeant came back to you in January

17 of 2011, what did you do as a next step other than notify your chain

18 of command?

19 A. I approached the brig about it--again, the status change,

20 the NCOIC and the OIC of the brig.

21 Q. And did you receive a response back from them?

22 A. I did, sir.

23 Q. And what was the response?

1 A. That they hold boards to--to evaluate whether or not
2 they're at the appropriate level--there're grievance boards, and
3 they're--to make sure the procedures are being followed
4 appropriately, sir.

5 Q. Were you satisfied at the time with that response?

6 A. I was, sir.

7 Q. And did you relay that response back to Private First Class
8 Manning?

9 A. I did, sir, yes.

10 Q. And after you relayed that response did he--did he ask for
11 any more assistance with any changes to his status itself?

12 A. Not at that time, sir.

13 Q. Did he at any other time?

14 A. No--no, sir. I apologize, but when we had gone over--I
15 mean every time he had an issue with his status and it was addressed,
16 they were noted appropriately, sir.

17 Q. Okay, and just to explain it to the court, when you say an
18 issue with the status ----

19 A. Yes, sir.

20 Q. ---- could you please explain what you mean with that?

21 A. Sir, from what I understand there's three levels of status.
22 There's--at the brig, there's no status just a regular Soldier being
23 detained or Marine being detained, prevention of injury, and then the

1 third level is prevention of suicide and prevention of injury.

2 Q. When it was the issue of Private First Class Manning's
3 confusion was it that he was asking you to have his status changed or
4 was it simply he was confused on why he was in that status?

5 A. He was confused as to why he was in the status, sir.

6 Q. And when you briefed your higher chain of command did they-
7 -was it ever to ask for assistance to change his status?

8 A. No--no, sir. I wasn't reaching out to the chain of command
9 for assistance. No.

10 Q. During your personal visits with him and through your back-
11 briefs from your subordinates, including the first sergeant, did you
12 ever feel that--that Private First Class Manning's health and welfare
13 was degrading to a level to get involved at all?

14 A. No, sir.

15 Q. And if he had, what would you have done?

16 A. If it had I would have taken action, sir. I would have not
17 only spoken with the Marine Corps chain of command, I would have
18 spoken to my chain of command as well. And if necessary I would have
19 brought a chaplain with me--I would have done something to help him,
20 sir, if I thought he needed that help.

21 Q. And--and actually this is the final question--well, not the
22 final--final series, did you--were you regularly briefing your chain
23 of command?

1 A. I was, sir.

2 Q. And that was Colonel Leiker and Colonel Coffman?

3 A. That's correct, sir.

4 Q. And in the January timeframe who else visited on one
5 occasion with your--with your First Sergeant to visit Private First
6 Class Manning?

7 A. Sir, I believe our--our Sergeant Major went as well.

8 Q. So Colonel Coffman ordered his Sergeant Major to go?

9 A. That's correct, sir.

10 TC[MAJ FEIN]: Thank you, Your Honor. No further questions.

11 **CROSS-EXAMINATION**

12 **Questions by the civilian defense counsel [Mr. Coombs]:**

13 Q. Captain Casamatta, when you started using the form that you
14 covered for the weekly reviews, that form was given to you by Captain
15 John Haberland, correct?

16 A. That's correct, sir.

17 Q. And that was the first time that a lawyer had told you to
18 use a specific form to visit a--a pretrial confinee, correct?

19 A. That is correct, sir.

20 Q. And at some point PFC Manning started to complain to you
21 about his POI status?

22 A. Sir, what do you mean by complain to?

23 Q. He started complaining about being on POI status, correct?

1 A. Sir, yes. We noted that.

2 Q. And--and you knew that he was taking issue with being held
3 in that position?

4 A. Sir, again, I don't understand the question. Are----

5 Q. You knew that PFC Manning, when he was saying I don't
6 understand why I'm here, he wasn't happy about being held in POI
7 status?

8 A. Yes, sir.

9 Q. And you don't recall the exact date when he first stated to
10 complain about it, but you know it was sometime in 2010?

11 A. Yes, sir, that's correct.

12 Q. And when PFC Manning brought that up to you then you knew
13 that it was an issue that you had to address?

14 A. Yes, sir.

15 Q. And I believe you told me that initially you brought that
16 issue up with Captain Haberland?

17 A. I did, sir.

18 Q. And you told him about PFC Manning no understanding why
19 he's on POI?

20 A. I did, sir.

21 Q. And then you also brought that issue up with your Battalion
22 and Brigade Commander, Lieutenant Colonel Leiker and Colonel Coffman?

23 A. That's correct, sir.

1 Q. And did any of those individuals, to your knowledge, take
2 any action based upon the issue?

3 A. I do not know the answer to that, sir.

4 Q. Now as you testified on direct, you or a member of your
5 command would try to visit PFC Manning at least weekly if possible?

6 A. We attempted to, sir.

7 Q. And these visits were always done in a no-contact booth?

8 A. A no-contact booth--yes, sir. Yes, sir.

9 Q. And you would ask the questions or someone from your chain
10 of command would ask the questions and--and they would be reflected
11 on those forms, right?

12 A. Yes, sir.

13 Q. And during the time that you were filling out the form, you
14 would--you'd sometimes have extra time afterwards to take to PFC
15 Manning?

16 A. Sir, we were never limited in our time.

17 Q. Okay, so you had conversations with him after the form was
18 completed?

19 A. Yes, sir.

20 Q. And what would you--you said you talked about various
21 things; his home life, sports, and what not, is that correct?

22 A. We did, sir.

23 Q. And was PFC Manning talkative when you spoke to him?

1 A. Not at first, sir. Not at first. We--we spoke more and
2 more as the weeks went on, sir.

3 Q. All right, so initially he wasn't as talkative to you, but
4 then he started to become more talkative?

5 A. That's correct, sir.

6 Q. And we his responses when he became more talkative limited
7 to just a yes or no response?

8 A. No, sir.

9 Q. How would you describe his general demeanor when he was
10 talking to you?

11 A. Engaged, sir.

12 Q. Was he always respectful?

13 A. Always, sir.

14 Q. Did he ever say anything to you that indicated to you he
15 might be a risk of harming himself?

16 A. No, sir.

17 Q. Did he ever say anything to you that would indicate that he
18 might be a risk of harming someone else?

19 A. No, sir.

20 Q. Did he ever say anything to indicate to you that he was
21 contemplating escaping from Quantico?

22 A. No, sir.

23 Q. When you spoke to him during his time at Quantico overall

1 how did--how did he appear to you?

2 A. Well mannered, sir.

3 Q. All right. And the time period that you spoke to him
4 afterwards about how long were your conversations once you got done
5 with the form when you just kind of talked to him?

6 A. Sir, I--they varied in time; 10 minutes to 15, maybe 20
7 minutes, sir.

8 Q. And during that time period did you ever feel that he was
9 becoming--he was withdrawn or reserved when you were talking to him?

10 A. Not particularly, sir. No.

11 Q. And was there a time period where you--you thought you
12 noticed a decline in his speaking to you?

13 A. No, sir.

14 Q. Now for the majority of the times a box is checked "no" in
15 response to the question of do you know why you are on POI, is that
16 correct?

17 A. Yes, sir.

18 Q. And what was your understanding as the commander why PFC
19 Manning kept on saying "no" to that answer?

20 A. Again, sir, the brig had put him on POI and that they had
21 no articulated that to the point that PFC Manning was happy with that
22 answer, sir.

23 CDC[MR. COOMBS]: I'm handing you Enclosure 26 to Appellate

1 Exhibit 259 [handing the document to the witness].

2 MJ: Yes, Major Fein?

3 TC[MAJ FEIN]: Nothing, Your Honor.

4 Q. Now I want to ask you a question about a particular form in

5 there, but before I do, you said that he wasn't happy with the

6 response. You as the company commander did you feel you got an

7 adequate response from the brig to indicate why they had him on POI?

8 A. I do, sir.

9 Q. And why did you feel that?

10 A. Sir, because this is their--their mission. This is their

11 job, sir. And I believe that that was their call to make.

12 Q. But did they adequately explain it to you, like why they

13 thought he was a risk to self-harm?

14 A. Sir, I--again, I wasn't second guessing them. And I don't

15 believe he was in any immediate threat by being in an increased

16 status. So that--I believe they adequately explained that to me.

17 Yes, sir.

18 Q. Okay. And I guess--can you tell me the extent to--how they

19 explained it to you why they thought he was a risk of self-harm?

20 A. Sir, just the--the situation that the Soldier was in.

21 Certainly the increased stress that was in his life, and all the

22 other factors that were playing a part of--of his current pretrial

23 confinement, sir.

1 Q. But I guess based upon your observations and exchange with
2 PFC Manning, did you notice anything that would make--to make you
3 feel that PFC Manning was going to harm himself?

4 A. No, sir.

5 Q. Now if you would, turn to Page 48 of the Enclosure. This
6 is your 5 January 2011 command visit.

7 A. [Looking through the document] Yes, sir.

8 Q. Now during that time PFC Manning tells you again that he
9 doesn't understand why he's on POI, correct?

10 A. [Looking at the document] Excuse me one second, sir. Let
11 me--yes, sir.

12 Q. All right. And I believe next to that you document that
13 you're going to discuss this with a master sergeant?

14 A. Yes, sir.

15 Q. And was that Master Sergeant Papakie?

16 A. I believe that to be correct, sir.

17 Q. All right. And--and so I imagine that you went and you
18 spoke to Master Sergeant Papakie about that?

19 A. Sir, I spoke to one of the--sir, I don't recall the NCO's
20 name that I spoke to on that day.

21 Q. When you spoke to them what--do you recall the
22 conversation?

23 A. I recall the conversation, sir.

1 Q. And what did you ask them?

2 A. Sir, I asked the question why is this Soldier on an
3 increased level of protection and what does he need to do to get off
4 of it and what procedures can be followed if he doesn't agree with
5 his--his current status?

6 Q. And what did they tell you?

7 A. That he's on the appropriate status. And that every week
8 it gets reviewed as far as--increased statuses get reviewed. And if
9 the committee decides that he should be reduced in status, then
10 that's what would happen.

11 Q. Did they--when you asked the question of why he was on that
12 status, they indicate why he was on that status at that point?

13 A. No--none.

14 Q. Now I want to ask you about two separate instances where
15 the Quantico brig increased the restrictions on PFC Manning, okay?

16 A. Yes, sir.

17 Q. And the first is documented as being on 18 January 2011, in
18 response to an anxiety attack that PFC Manning had. And they placed
19 him on suicide risk. Were you aware that they placed him on suicide
20 risk at that time?

21 A. Not when it happened, sir.

22 Q. Were you later informed?

23 A. Yes, sir.

1 Q. And if I understand based upon our previous conversations,
2 you went to go speak to PFC Manning at this point?

3 A. I did, sir.

4 Q. And when you saw him, you didn't see anything, based upon
5 your observation of him, that would indicate that he was a suicide
6 risk?

7 A. I did not, sir.

8 Q. And did you address this issue then with the brig?

9 A. Sir, I did not at that time.

10 Q. But did you later ----

11 A. I did, sir.

12 Q. ---- address it with the brig? And how so?

13 A. Sir, again, I went to see the Chief Warrant Officer to find
14 out what happened. And, again, if the grievance procedure--if the
15 Soldier didn't feel that that was necessary, what was the standard
16 operating procedure, sir.

17 Q. Did the--and if you went to see the Warrant Officer, was
18 that Chief Averhart?

19 A. I believe so, sir, yes.

20 Q. And did Chief Averhart tell you why he placed PFC Manning
21 on suicide risk?

22 A. Sir, because of an outbreak--that occurrence that had
23 happened--that the Soldier had an outburst, sir.

1 Q. And at that point did he inform you that the--the brig's
2 forensic psychiatrist had indicated that suicide risk was not
3 warranted?

4 A. He did not, sir.

5 Q. Would that have been a piece of information that you would
6 like to have known?

7 A. Yes, sir.

8 Q. And if that had been told to you what would you have done?

9 A. Sir, I would have readdressed the issue.

10 Q. And, in fact, you did also address this issue with Captain
11 Haberland at the time, too, right?

12 A. I did, sir.

13 Q. And how so?

14 A. Sir, I brought it up to him just like I had anytime
15 anything was out of the norm for our meetings, sir.

16 Q. And did Captain Haberland inform you that the brig
17 psychiatrists were saying that suicide risk was not warranted?

18 A. No, sir.

19 Q. Did you address this issue with your Battalion and Brigade
20 Commanders?

21 A. With the Battalion Commander, sir. I can't recall if at
22 this time I brought it up to the Garrison Commander or if I allowed
23 my boss to do so.

1 Q. And how did you address it with Lieutenant Colonel Leiker?

2 A. Sir, it was--it was informal relationship. He allowed me

3 into his office any time after a meeting with PFC Manning to bring up

4 any issues that I had. So I used that open-door to discuss this with

5 him, sir.

6 Q. And you had said that had you known that the brig

7 psychiatrist were saying that suicide risk was not warranted you

8 would have readdressed the issue.

9 A. I would have.

10 Q. And what would you have done?

11 A. Well, sir, again, I would have, you know, contacted the

12 brig and asked them for any kind of justification. Again, not to

13 tell them how to do their job, but the bottom line is, I would have

14 wanted to find out exactly why--on what basis were they refusing to--

15 to decrease the status, sir.

16 Q. Now on 2 March, that the second time that restrictions are

17 increased. That's when PFC Manning is--well actually 3--toward the

18 end of 2 March his underwear is removed from him.

19 A. Yes, sir.

20 Q. Were you informed about that?

21 A. Not at the time, sir.

22 Q. But later were you informed?

23 A. Yes, sir.

1 Q. And did you address this issue with PFC Manning at any
2 time?

3 A. Sir, we spoke--we spoke about the increase in status but
4 not specifically of the incident, sir.

5 Q. Well did you ever find out about the comment that PFC
6 Manning made?

7 A. I did, sir.

8 Q. And did this sound like a threat of suicide?

9 A. Not to me, sir.

10 Q. And why not?

11 A. Sir, I--now I have the luxury of looking at it from an
12 outside point of view, sir. And, quite frankly, I--I wouldn't take
13 that comment from PFC Manning as a suicidal threat or ideation. I
14 simply would take it as a tongue-in-cheek comment.

15 Q. And why--why would you take it that way?

16 A. Sir, nothing about his demeanor led me to believe he was
17 suicidal. And, quite frankly, he's an intelligently and articulate
18 person. And I believe he--he just wouldn't have such thoughts of
19 actually killing himself with his underwear, sir.

20 Q. Now when you heard about this and based upon how you felt,
21 you did bring this issue up again with Captain Haberland, correct?

22 A. Yes, sir.

23 Q. And--and you addressed it also with Colonel Coffman?

1 A. I did, sir.

2 Q. And what did you tell Colonel Coffman?

3 A. Sir, I told him just that; that it appeared as though PFC

4 Manning had made a comment that got him into a situation where he was

5 on an increased suicide watch and his liveries had been removed at

6 that time, sir.

7 Q. And when you addressed it with Colonel Coffman was it just

8 to inform him of that or was it to also inform him that you didn't

9 believe the increased status was warranted?

10 A. Sir, I did not believe the increased status was warranted

11 at that time.

12 Q. And--but did you inform Colonel Coffman of that fact?

13 A. I did, sir.

14 Q. And what was his response?

15 A. Sir, although he was in the middle of doing several things

16 at once, I--I can't remember if I specifically requested that he

17 speak to the brig--or the Commander of Quantico itself, but we talked

18 about him talking to the Commander of Quantico, sir.

19 Q. Okay, so the gist of the conversation after you raised it

20 to Colonel Coffman was, hey, look, I'll address this issue with

21 Colonel Choike, the Marine Corps Base Commander?

22 A. Yes, sir.

23 Q. And do you know if that was ever actually done?

1 A. Sir, I do not know at that time if that was done.

2 Q. Now you had talked about several times where PFC Manning
3 was taken to various appointments, were you ever along with those as
4 an escort?

5 A. I was, sir.

6 Q. And during that time did you have the ability to observe
7 PFC Manning's conduct?

8 A. I did, sir.

9 Q. And how would you characterize PFC Manning's conduct when
10 you were taking him around to various appointments?

11 A. Very professional, sir.

12 Q. Did you ever have any issues with him?

13 A. Never, sir.

14 Q. All right. Did he ever have any outbursts?

15 A. None, sir.

16 Q. Was he ever disrespectful to any of your--I guess any of
17 your company Soldiers or yourself?

18 A. No, sir.

19 Q. Now PFC Manning was eventually transferred to the JRCF on
20 20 April, is that correct?

21 A. Yes, sir, that's correct.

22 Q. And how were you made aware of the pending transfer?

23 A. Sir, I received a phone call when the--as the transfer was

1 happening, sir.

2 Q. So you didn't find out in advance?

3 A. I did not, sir.

4 Q. When you found out he was being transferred what'd you do?

5 A. Sir, I immediately went in and told my Battalion Commander

6 that the transfer had been completed, sir.

7 Q. And once PFC Manning got to the JRCF did you continue to

8 conduct your command visits?

9 A. Yes, sir.

10 Q. And when you saw PFC Manning at the JRCF did he look

11 different to you?

12 A. He did, sir.

13 Q. How so?

14 A. Sir, he looked more at ease, more lively, sir.

15 Q. And to this day do you understand why PFC Manning was held

16 in MAX and POI for 9 months at Quantico?

17 A. No, sir.

18 CDC[MR. COOMBS]: Thank you.

19 MJ: Redirect?

20 TC[MAJ FEIN]: No, Your Honor.

21 MJ: I have a couple of questions.

1 **EXAMINATION BY THE COURT-MARTIAL**

2 **Questions by the military judge:**

3 Q. Now you talked about on the 2nd of March--the 3rd of March
4 after the underwear comment about PFC Manning's change in status, did
5 you think he was on suicide risk that whole time?

6 A. Not the entire time. Not until this incident happened,
7 ma'am.

8 Q. I mean on the--what was your understanding of what changed
9 with PFC Manning after the comments of 2 March?

10 A. That's when I--to my understanding he was put on the
11 increased status--the maximum level of status the facility allowed.

12 Q. If he remained on prevention of injury with the underwear
13 taken away at night because of the comment, do you have the same
14 concerns that you had--that you just articulated?

15 A. Which concerns, ma'am.

16 Q. That you just testified to with the defense counsel--that--
17 where you--you became concerned that the increased status wasn't
18 warranted?

19 A. Yes, ma'am. Yes, ma'am.

20 Q. Okay, so he didn't--so to remain POI you would have the
21 same concerns?

22 A. I had the same concerns, yes, ma'am

23 Q. When did you first become aware that the psychiatrist had

1 for the most part not been recommending a continuation on POI?

2 A. Once this trial started.

3 Q. Do you think that you should have been made aware of that?

4 A. I believe I should have been made aware of that, yes,

5 ma'am.

6 Q. Why?

7 A. Ma'am, as the commander I believe I should have been

8 privileged to that information if nothing more than--than to have

9 another avenue to speak with the Soldier. You know, any opportunity

10 I had to speak with PFC Manning, I took. And if a medical

11 professional is recommending against something I would like to know

12 that so maybe I can be a part of that decision making process.

13 Q. I guess that's where I'm confused because I thought you

14 testified earlier that that decision making process was up to the

15 brig?

16 A. It is up to the brig, ma'am. It is up to the brig. But

17 nonetheless, if I believe something's wrong I--I have no problem

18 pointing that out, ma'am.

19 Q. Did PFC Manning ever tell you that anybody was recommending

20 that he come off of POI?

21 A. No, ma'am.

22 [Pause]

23 Q. At some point did you begin to see media articles about the

1 conditions of confinement or any of that ----

2 A. A few times, ma'am.

3 Q. ---- publicity? Around when did you begin to see that?

4 A. Throughout the entire ordeal, ma'am. You know, when it was

5 on the news or anything to that effect. It was certainly front page

6 news for a while.

7 Q. Did that cause you any concern that maybe something was

8 not--maybe the word wasn't substantive?

9 A. No, ma'am. No, ma'am. One particular article that was

10 brought to my attention stated how I--I as his commander forced PFC

11 Manning to stand at attention while I spit on him.

12 Q. Really?

13 A. So I certainly gave no credence to--to anything. And when

14 it was on the news I simply turned it off.

15 [Pause]

16 Q. Now you spoke to Chief Averhart while he was the commander

17 of the brig. Did you also speak to CW2 Barnes while she was the Brig

18 Commander?

19 A. I did, ma'am.

20 Q. And what--did you ever have a conversation with her about

21 why PFC Manning remained on POI status?

22 A. I did, ma'am.

23 Q. Can you tell me about that?

1 A. Ma'am, the conversation was--again, just that, to figure
2 out exactly why he was on increased status, and more importantly,
3 what status a normal detained individual would be on. And what the
4 differences between that and what PFC Manning was currently on.

5 Q. And what did she tell you?

6 A. That Manning being, number one, pretrial confinement made
7 his situation completely different. And, number two, everything
8 that's involved in this--the case that's going up to--everything else
9 that's going on made Private Manning a different issue; they had to
10 pay special attention.

11 Q. Did she ever say how that related to the status he was in--
12 --

13 A. Ma'am, that was ----

14 Q. ---- with his custody level?

15 A. ---- yes, ma'am. Yes, ma'am. That--that because of the
16 weight of everything that was happening, they were afraid he was
17 going to hurt himself.

18 Q. When you asked--which brig officials did you ask the
19 question that you testified about earlier; how can he get off of that
20 status? Who did you discuss that with?

21 A. Ma'am, the--the NCOIC--the shift NCOIC and--and, again, the
22 Chief Warrant Officer--CW3--that was the--

23 Q. Chief Averhart or ----

1 A. ---- Averhart ----
2 Q. ---- Chief Barnes?
3 A. ---- yes, ma'am. Averhart.
4 Q. Okay. So what did these people tell you about this?
5 A. Again, that there's a board process that's in place to
6 review any decisions that are made. And that's the system that they
7 use.
8 Q. And in my view that's a little bit unresponsive to the
9 question of what PFC Manning can do. Did--did they ever address that
10 question from you?
11 A. Other than to say that the status was appropriate, no,
12 ma'am. No, ma'am. Again, the--the system that they used and the
13 evaluation system that they used specifically was in place for a
14 reason. And they had him where they found it to be an appropriate
15 action.
16 Q. And did I understand your testimony correctly earlier when
17 you said one of these conversations took place somewhere around the
18 14th or 15th of January?
19 A. Yes, ma'am.
20 Q. Did anybody you talked to from the brig on or about the
21 15th of January, tell you that there was some considerations of maybe
22 taking PFC Manning off of the POI status by brig officials?
23 A. Not that I recall, ma'am.

1 MJ: Any follow-up based on that?

2 TC[MAJ FEIN]: May I have a moment?

3 MJ: Yes.

4 [Pause]

5 TC[MAJ FEIN]: No, Your Honor.

6 MJ: All right. Anything from the defense?

7 CDC[MR. COOMBS]: No, Your Honor.

8 **[The witness was duly warned, permanently excused, and withdrew from**

9 **the courtroom.]**

10 MJ: Okay.

11 TC[MAJ FEIN]: Your Honor, the United States requests a 15-

12 minute recess to finalize the recommendation for going forward.

13 MJ: Well that's fine. Okay, do you want to start at 1800 or

14 earlier than that?

15 TC[MAJ FEIN]: 1800's fine, ma'am.

16 MJ: All right. Any objection?

17 CDC[MR. COOMBS]: No, Your Honor.

18 MJ: Court is in recess until 1800 or 6 o'clock.

19 **[The Article 39(a) session recessed at 1743, 10 December 2012.]**

20 **[The Article 39(a) session was called to order at 1803, 10 December**

21 **2012.]**

22 MJ: This Article 39(a) session is called to order. Let the

23 record reflect all parties present when the court last recessed are

1 again present in court. Major Fein, what is the government's plan?

2 TC[MAJ FEIN]: Ma'am, the United States does not intend to call
3 Colonel Coffman any longer for this motions hearing. And the defense
4 does not intend to call him as a defense witness. So at this point
5 the government closes its case on the motions hearing.

6 The government recommends, with the defense's concurrence,
7 that the court recesses tonight, reconvenes at 10 o'clock tomorrow
8 morning for oral argument.

9 MJ: Okay, why 10 o'clock?

10 TC[MAJ FEIN]: Ma'am, 10 o'clock provides a little bit
11 additional time to wrap up today's testimony to prepare. And then
12 isn't late in the day so we can finish at a reasonable hour.

13 MJ: Okay. Any objection to that?

14 CDC[MR. COOMBS]: No objection, Your Honor.

15 MJ: All right, then we will go ahead and recess the court for
16 the evening--whoops.

17 TC[MAJ FEIN]: There's a--there's one more thing--sorry, Your
18 Honor.

19 MJ: Okay.

20 TC[MAJ FEIN]: Also, the United States would--would like to, I
21 guess, admit it as an appellate exhibit what's been marked--
22 previously marked as Appellate Exhibit 443. Your Honor, in the
23 government's motion or response--appellate--to Appellate Exhibit--or

1 what has been marked as Appellate Exhibit 259, Enclosure 2 was a
2 single memorandum signed by Master Sergeant Adkins.

3 MJ: Whoa, whoa, whoa. Now you're going too fast for me now.

4 TC[MAJ FEIN]: I'm sorry, yes, Your Honor.

5 MJ: This is the ----

6 TC[MAJ FEIN]: In the original motion or response to the motion
7 ----

8 MJ: ---- Enclosure 2 ----

9 TC[MAJ FEIN]: ---- Enclosure 2 to Appellate Exhibit 259 ----

10 MJ: ---- is a memorandum for record. I got it.

11 TC[MAJ FEIN]: ---- yes, ma'am.

12 MJ: Okay.

13 TC[MAJ FEIN]: The government intended originally to provide
14 three memorandums--memoranda for record that are similar ----

15 MJ: Are they all part of this--I mean do they all fall in line
16 with Enclosure 2?

17 TC[MAJ FEIN]: They're the same substance or subject matter--
18 same type of memorandum.

19 MJ: Well is there any objection to just making it part of
20 Enclosure 2 so we don't have a million more appellate exhibits?

21 TC[MAJ FEIN]: Not from the government, ma'am.

22 CDC[MR. COOMBS]: Nothing from the defense, Your Honor.

23 MJ: Okay, why don't we just go ahead--and if you could get me

1 copies of those I can put them in and then I will now have ----

2 TC[MAJ FEIN]: So, ma'am, we're adding two more documents--
3 excuse me, three more documents to that enclosure. And it's not
4 marked as Appellate Exhibit 443.

5 MJ: Do I have a copy of those or?

6 TC[MAJ FEIN]: Yes, ma'am. Right there [referring to the court
7 reporter].

8 MJ: Thank you.

9 TC[MAJ FEIN]: The court reporter's handing them to you.
10 [The court reporter handed the documents to the military judge.]
11 [Pause]

12 MJ: Let me just ask both sides a question. I remember I had a
13 question of one of the witnesses about whether the brig was aware of
14 the mental health history coming back from Fort Drum. This all is
15 dated December of '09. That would be part of that. Did that go to
16 the brig or not?

17 TC[MAJ FEIN]: Ma'am, these memoranda were not provided to the
18 brig.

19 MJ: So you're offering it just so I have it in reference to
20 what, if any, prior history there was?

21 TC[MAJ FEIN]: Yes, ma'am, for oral argument.

22 MJ: Okay. So both sides are in agreement on that; anything
23 that predated Camp Hammer was not ----

1 TC[MAJ FEIN]: Well, no, ma'am. I'm sorry. To clarify; the
2 medical records--Private First Class Manning's medical records were
3 available to the brig psychiatrist and other medical professionals
4 while they were there at Quantico. Any other documentation such as
5 these MFRs and an AAR by CID was not available to the Quantico Brig.

6 MJ: Okay, so brig officials didn't they--their determination
7 had nothing to do with Enclosure 2?

8 TC[MAJ FEIN]: That is correct, Your Honor.

9 MJ: Okay, and then defense agrees?

10 CDC[MR. COOMBS]: Yes, Your Honor.

11 TC[MAJ FEIN]: And then, also, Your Honor, tomorrow morning the
12 government intends to provide a--a list of emails between the
13 prosecution and defense--have already been provided to the court as
14 part of the trial that really outlines Article 13 and discussions
15 counsel had and didn't have. It's part of oral argument. We'll
16 title it ahead of time for the court.

17 MJ: Okay. And are you ----

18 TC[MAJ FEIN]: That's it, Your Honor.

19 MJ: ---- also going to do that with respect to the speedy trial
20 like I asked you to?

21 TC[MAJ FEIN]: Oh, absolutely, ma'am.

22 MJ: All right, anything else from either side that we need to
23 address today?

1 TC[MAJ FEIN]: No, ma'am.

2 CDC[MR. COOMBS]: No, Your Honor.

3 MJ: All right. Court is in recess until 10 o'clock tomorrow
4 morning.

5 **[The Article 39(a) session recessed at 1808, 10 December 2012.]**

6 **[END OF PAGE]**

1 [The Article 39(a) session was called to order at 0957, 11 December
2 2012.]

3 MJ: This Article 39(a) session is called to order. Let the
4 record reflect all parties present when the court last recessed are
5 again present in court.

6 Is there anything we need to address before we begin argument?

7 TC[MAJ FEIN]: No, Your Honor.

8 CDC[MR. COOMBS]: No, Your Honor.

9 MJ: All right. Mr. Coombs?

10 CDC[MR. COOMBS]: Yes, Your Honor. Your Honor, I am handing
11 you a copy of what's been marked as Appellate Exhibit 443.

12 MJ: Thank you.

13 CDC[MR. COOMBS]: Your Honor, for the Article 13 issue, our
14 motion lays out what we believe to be the basis for why this should
15 be granted by this court. When you take a look there are some clear
16 violations in the defense's position on Article 13.

17 The first, the max in POI after 27 August 2010. Here not
18 only is there what appears to be a clear intent at issue but also no
19 legitimate non-punitive basis for why the conditions were in place.

20 MJ: What is the evidence in this point of intent to punish at
21 this time?

22 CDC[MR. COOMBS]: The evidence would be both the order of
23 Chief Averhart to keep PFC Manning in POI until the 706 board was

1 completed. The order by Colonel Oltman to keep PFC Manning in
2 maximum POI indefinitely and what we believe and we will go through
3 the facts of Lieutenant General Flynn's influence. Additionally,
4 Your Honor, under Article 13, if conditions are more onerous than
5 necessary that can give rise to a intent to punish.

6 So, some of the other violations you see the SR. We know
7 that Chief Averhart had a belief that SR meant to be determined.
8 That's a clear violation of the SECNAV Instruction. Chief Galaviz
9 has testified as to why a commander would have to remove an
10 individual from SR as soon as a Brig psychiatrist said it was no
11 longer needed. The 20-minute of sunshine: We know that at least
12 from Chief Galaviz that should be 1 hour. We even heard from Chief
13 Barnes that that should be 1 hour.
14 MJ: Other than the disciplinary segregation paragraph in the SECNAV,
15 is there anything else in the SECNAV that addresses 1 hour?

16 CDC[MR. COOMBS]: There isn't anything that says that an exact
17 hour is needed, no, Your Honor. Although, you do see disciplinary
18 segregation is given 1 hour. And so, in this instance PFC Manning
19 was not in any disciplinary segregation so it would be counter
20 intuitive to say that he would get something less than the 1 hour.

21 We also know that the removal of the underwear. Chief
22 Barnes initially said that she had the authority to do that and in
23 fact disagreed with Chief Galaviz and Lieutenant Colonel Wright on

1 the fact that she was taking actions that were counter to the SECNAV
2 instruction. Based upon the court's questions to her, she
3 acknowledged that yes, indeed she was using a provision under suicide
4 risk to give her the authority to remove clothing. Again, another
5 violation of the SECNAV Instruction.

6 MJ: Let me ask you on that. The SECNAV Instruction that talked
7 about removal of clothing are under the suicide risk provisions.
8 What is the defense's position, is there some kind of inherent
9 authority in a Brig Commander to remove clothing in other
10 circumstances?

11 CDC[MR. COOMBS]: Nothing that I could see in the SECNAV
12 Instruction and that is why Lieutenant Colonel Wright said, look you
13 are taking steps that are in conformity of suicide risks and you are
14 not placing the individual in suicide risk. The email from Chief
15 Barnes to Master Sergeant Papakie basically alludes to the fact that
16 she believed at that time she figured an end-around. She said, look,
17 if we were to put him on suicide risk and once a doctor said it was
18 not warranted what would we have done with the underwear? Food for
19 thought. Really what that was meaning--meant to say was look, we
20 would have had to give the underwear back. And she had said, hey, I
21 figured something around the SECNAV Instruction. Well, on the stand
22 she acknowledged to the court that her authority was in fact under
23 the suicide risk provisions.

1 Then we see the standing naked on 3 March. I'll go into
2 more detail on this but the fact that we do not have anybody coming
3 to testify about that who has first-hand knowledge other than PFC
4 Manning should speak volumes. Now, again, the issue here under the
5 defense's position is not whether or not PFC Manning was treated
6 differently than other max and POI detainees, the issue is why was he
7 ever a max and POI detainee after 27 August 2010. That is the issue
8 that gives rise to the Article 13 and it is the defense's position
9 that the reason why he remained in max or POI was the influence of
10 Lieutenant General Flynn. We know from the very beginning Lieutenant
11 General Flynn sends an email saying that in his opinion PFC Manning
12 is a prime candidate to take his own life. He is a suicide risk and
13 he directs Colonel Choike to tell everybody who has any contact with
14 PFC Manning the absolute necessity of keeping a close watch on him.

15 MJ: What was the date of the email?

16 CDC[MR. COOMBS]: That was 9 August. And so you get this
17 email, 9 August, again this is right, this is actually right after
18 Captain Hocter says PFC Manning is no longer a suicide risk, but PFC
19 Manning is still on suicide risk precautions until 11 August. Now,
20 it's clear that Colonel Choike followed the guidance of his general.
21 Did Lieutenant General Flynn issue an order to keep PFC Manning in
22 max and POI? No, probably not, but he didn't need to. His guidance
23 did that and accomplished that and we see the fact that----

1 MJ: What evidence do we have of that?

2 CDC[MR. COOMBS]: Well, the evidence that we have is the fact
3 of what he directed is the weekly reports that go up through the
4 chain of command and Colonel Choike----

5 MJ: What evidence do we have that he directed that?

6 CDC[MR. COOMBS]: Because Colonel Choike in response, again on
7 that 9 August email, says based upon what you said, I'm going to
8 direct that we get a weekly report coming up from Colonel Oltman to
9 me and then to give to you. And what you see from that is how PFC
10 Manning is being held and everybody knows, even Gunny Sergeant Blenis
11 in one of his emails acknowledges that he knows that these weekly
12 reports are going up through the chain. And landing either on
13 General Flynn's desk or even higher headquarters and what they are
14 not hearing is anything back from the chain saying we are not
15 concurring and we know that Colonel Oltman is concurring with
16 everything. So, from that then the easiest course of action at that
17 point is to continue the course of action that you are doing, keeping
18 him in max and POI, being ultra conservative because at this point
19 you know that your three-star general believes he is a suicide risk
20 and hasn't said anything to the contrary.

21 Now, we see the March email where they do make certain
22 changes then it even becomes clearer the involvement of Lieutenant
23 General Flynn at that point. Colonel Choike on the stand tried to

1 say, look, you know, I know what the email said, but that's not what
2 it meant, but it's clear. Colonel Choike was going to receive a
3 briefing up to him and then he was going to take whatever steps they
4 were going to suggest to General Flynn for his concurrence or non-
5 concurrence.

6 MJ: Wasn't that email generated as a result of General Flynn
7 waking up in the morning and reading an article in the New York Times
8 and that was the first he had heard of it?

9 CDC[MR. COOMBS]: That was and he sent the email saying I
10 would rather get some information on this then hearing it in the
11 Early Bird.

12 MJ: Isn't that something a commander would normally do?

13 CDC[MR. COOMBS]: That may be the case, Your Honor, but the
14 issue here is a three-star general reaching down all the way to say,
15 okay, from this point forward, now before you do anything you need to
16 brief it up to me for my concurrence/non-concurrence. Had it just
17 been simply, hey look, I want to be made aware of that. That would
18 have been fine but that is not what that email says and that's not
19 the steps he directed. And Colonel Oltman said, look, I want
20 something in writing. Again, if there--if this was not General
21 Flynn's concurrence/non-concurrence then the common sense response
22 from Colonel Choike would have been, Colonel Oltman, you've got it
23 all wrong, General Flynn just wants to be briefed. Don't worry about

1 concurrence/non-concurrence. But that's not his response to them.
2 His response is we are not going to get anything in writing from the
3 CG.

4 MJ: What is the defense's position on Lieutenant General
5 Flynn's authority to do just that if he decided to do that, before
6 you execute any changes with respect to PFC Manning's custody, I want
7 to know what they are and I want to have an opportunity to intervene?

8 CDC[MR. COOMBS]: Well, you know, at this point it is unclear.
9 Colonel Choike believed that General Flynn did not have that
10 authority. He believed as a Base Commander he did though, he had the
11 authority for potentially to do something but not General Flynn.

12 MJ: So, he had authority but his boss didn't?

13 CDC[MR. COOMBS]: That's what Colonel Choike testified to.

14 MJ: Well, what's the defense's position on that?

15 CDC[MR. COOMBS]: The defense's position is under the SECNAV
16 Instruction it is the Brigade--the Brig OIC who has the authority to
17 make changes. Now, in this instance you could see where if, in fact,
18 a certain Battalion Commander said, hey, I'm going to hold him in a
19 particular custody status, I'm going to direct the Brig OIC to do
20 that. Well, you would see a chain of command, the Brig OIC would
21 probably follow that. Whether or not the SECNAV Instruction gives
22 that authority, it doesn't appear so. It looks like the Brig OIC is
23 supposed to be the person who has the final say, but even if they do

1 have the authority the problem here isn't necessarily that they might
2 have taken that step. The problem is that they determined without
3 looking at any objective criteria that PFC Manning was now a suicide
4 risk and the influence that came down of keeping him in max and POI
5 was based upon General Flynn's initial concern. And you see this
6 because General Flynn becomes even involved in the most minor details
7 dealing with who's visiting PFC Manning, whether or not I'm
8 contacting him and it's really kind of a cyclic thing where you see
9 by looking at the emails you can see that Colonel Choike is kind of
10 like the hub of information. And, you get his staff on the right-
11 hand side which is Galaviz, Captain Neill, Colonel Johnson, his SJA
12 support, all supporting the idea that everything that the Brig is
13 doing is correct. How they are holding him is correct, is lawful.
14 And you get Lieutenant Colonel Greer sending information to the MDW
15 SJA shop saying look, if you don't like the way he's being held, take
16 him from us. But unless and until you come and take control of him,
17 we are the one left holding the bag if something happens to him. The
18 most telling email is Colonel Choike's back to Colonel Oltman why
19 General Flynn wants to be involved, because he wants to consider the
20 impact, the political impact of this situation, the immediate impact.

21 MJ: What's the problem with that?

22 CDC[MR. COOMBS]: The problem with that is because they were
23 more concerned with how that it would appear if something happened to

1 PFC Manning to the Marine Corps, to Quantico, and to this command,
2 than they were on whether or not PFC Manning was actually a risk to
3 do self-harm. And because their concern was not on what are the
4 conditions that we need to impose upon PFC Manning to ensure his
5 presence at trial. That wasn't their concern. That wasn't their
6 focus. Their focus was let's not have anything happen on our watch.
7 Let's not have anything backfire and make us look bad. And the
8 emails, especially Lieutenant Colonel Greer's is the most telling one
9 of them all, of saying well, look, we are going to be the ones left
10 holding the bag if something happens to him. We don't see anyone
11 coming here under an Army letterhead saying we are going to assume
12 responsibility. If you don't like how we are holding him, take him
13 from us. And so you get the information going back and forth and
14 then also from--on the left-hand side from Colonel Oltman you get
15 Colonel Oltman at least in a meeting indicating that PFC Manning is
16 not going to remove--be removed from this custody status. He is
17 going to stay in this status indefinitely. And that's where one
18 voice of reason----

19 MJ: Is that the 14 January email?

20 CDC[MR. COOMBS]: It is but that really kind of shows for the
21 first time because somebody voices a complaint and that's Captain
22 Hocter saying, look, you know, if you are going to keep him on POI,
23 just don't say there is a behavioral health reason for it because

1 there is not. Change your SOP if that's the case. But Colonel
2 Oltman issues basically his directive that he's receiving from higher
3 and who's presence there is of course Averhart, Barnes' replacement,
4 and all of the Brig staff. And so everybody understands what's going
5 on and even when the MDW SJA shop gets complaints from the defense,
6 you see from the emails that they are less concerned about--about the
7 potential Article 13 issue as far as punishment of PFC Manning and
8 more concerned about getting information to combat the potential
9 Article 13 issue.

10 And so what happens here under the defense's argument is a
11 complete breakdown of the way the system should work. Nobody stopped
12 to say, wait a second, does PFC Manning truly need to be in max and
13 POI and the individuals who should have stepped up, the Judge
14 Advocate, especially in the Colonel Oltman meeting, Lieutenant
15 Colonel Greer should have stood up and said, wait a second. We can't
16 say that he's going to stay in max and POI indefinitely. We have to
17 have a basis for this. And again the MDW shop, even when they had
18 complaints and Captain Haberland's email clearly indicates that the
19 defense was trying to work through MDW to resolve this. They sent an
20 email saying, you know, "look we are not telling you need to change
21 the position, we just want to get some information to combat the
22 potential Article 13 issue".

23 MJ: When did the defense begin to complain?

1 CDC[MR. COOMBS]: The defense began to complain in the late-
2 October/early-November timeframe to the trial counsel in an effort to
3 resolve this going through the MDW. And the email from Haberland
4 which the court has starts to--that's in the December timeframe that
5 that one is sent.

6 MJ: Are there earlier emails in October and November?

7 CDC[MR. COOMBS]: I don't believe so, ma'am. And that--and
8 actually the reason for that makes sense when I talk in a moment
9 about what PFC Manning knew and why he waited to complain. So, you
10 see that the emails that you have been able to look at from Major
11 General Ary and from other very high ranking individuals in the
12 Marine Corps really worked to silence any critics because those
13 emails said we are confident that the Brig is doing the right thing.
14 We're confident that Lieutenant General Flynn is doing everything
15 correctly. And those emails get passed around to everybody that's
16 really a player in this case, Chief Averhart, Chief Barnes, even down
17 to their staff and the so-called visits or inspections that come,
18 they are not really visits or inspections. They are just walk-
19 throughs to say, well, yeah it looks like he is held as every other
20 max and POI detainee. Nothing that Major Zelek did ever address
21 whether or not PFC Manning was wrongly held in max or POI.

22 MJ: That was your first bullet, critics were silenced. Who
23 were the critics?

1 CDC[MR. COOMBS]: Anybody who would have voiced up. In this
2 case the only person that ever did was Captain Hocter, but if you
3 are--let's say for example, you're Gunny Sergeant Blenis, you're the
4 counselor and let's say you are actually wanting to--to ensure that
5 your guy is taken off. You are going to be his advocate and you are
6 going to say, you know what, you have been a very good detainee this
7 entire time. The mental health professionals are telling me you are
8 not a risk of injury. I'm going to go and advocate for you. I'm
9 going to advocate that you should be taken off max and POI. That
10 would never happen when you see these emails of Major General Ary,
11 Lieutenant General Flynn, and others, the Commandant of the Marine
12 Corps saying, look, what they are doing is proper. They are holding
13 him in the proper status. They are not doing anything wrong. And
14 those emails get CCed around including the entire chain from Colonel
15 Choike down to Chief Averhart and Barnes, down to their staff.

16 MJ: Did any of those emails suggest that if they did anything
17 different that they would be wrong?

18 CDC[MR. COOMBS]: No, ma'am, but the logical position there is
19 if you are looking and you see the Commandant of the Marine Corps and
20 the equivalent of the TJAG of the Marine Corps saying what is being
21 done is proper. Is it really--Do you really expect that a lower
22 enlisted or even for that matter a master sergeant or even the--Chief
23 Barnes or Averhart would then step up and say, you know what, I'm

1 going to change that position. Because if they make a mistake it is
2 clear where it is going to end, where everything is going to roll
3 down to them. And so that's what silenced the critics because at
4 that point you have, what I'll talk about in a moment of having a
5 group thing.

6 MJ: Well, let me ask you this. If you make a mistake, if Chief
7 Averhart and Chief Barnes were concerned that PFC Manning was going
8 to hurt himself and they downgraded his status and he did, that would
9 come down to--on their shoulders because they made that decision.
10 Isn't that true?

11 CDC[MR. COOMBS]: That is true.

12 MJ: So, is there some legitimate government interest in
13 preventing him from harming himself?

14 CDC[MR. COOMBS]: Well, it can't be arbitrary, that's the
15 problem. And their position was arbitrary. They didn't have any
16 information to indicate that he was a risk for self-harm at that
17 point. What they had was month, after month, after month of good
18 behavior. They had a psychiatrist, a mental health professional,
19 month after month saying he doesn't need to be on POI. What they
20 kept looking to and pointing to are old-type information that did in
21 fact warrant his initial custody classification and they kept
22 pointing to that as their justification and even when given the
23 opportunity on the stand, tell me why you have him in max? Tell me

1 why you had him in POI? Neither Chief Averhart, Chief Barnes, or for
2 that matter Gunny Sergeant Blenis could articulate anything other
3 than oh, well, you know the Kuwait stuff and there was that intake
4 statement, and, and uh, there was some behaviors. That's not----

5 MJ: I believe communication also was a large part of it?

6 CDC[MR. COOMBS]: That's the red herring of this whole thing,
7 actually. When you take a look at everything, the Article 138
8 response by Chief Averhart, it doesn't say anything about
9 communication. Chief Barnes her first real communication concerns
10 are really after March. She even admitted on the stand as of 25
11 February he was doing fine and the communication issues that happened
12 in March, it's clear that PFC Manning does the only sane thing at
13 that point and that's stop communicating with these people. Because
14 when he says anything they take it and blow it out of proportion. He
15 makes a comment where he thinks he's actually getting through to
16 Master Sergeant Papakie, where Master Sergeant Papakie is listening
17 to him and he's thinking he is making headway. Little does he know
18 all he is doing is basically giving them the information that they
19 need now to take away his underwear for the next month and a half.
20 So, you see at this point the system starts to create and feed off
21 itself because now you have at best an incestual relationship with
22 everybody. It is absolutely amazing how everybody involved in this
23 whole process knew each other. Chief----

1 MJ: Why is that amazing?

2 CDC[MR. COOMBS]: That's amazing because Chief Galaviz has
3 known Averhart for 10 years. Chief Galaviz was hand-picked by
4 Colonel Choike to do his investigation in order to basically help
5 support his 138. The second we bring--we try to bring someone else
6 out of the equation from the Army, the answer we get is arm strong
7 quarterbacks are not welcomed. If he is going to come here and
8 actually second guess the custody classification we don't want that
9 and then of course Oltman says, hey, I can brush them off quite
10 easily, and they do. So, what was welcomed is people who are going
11 to come and basically give the rubber stamp of hey, everything is
12 fine here. There is no issue. Let's move on. And again, as I said,
13 Colonel Oltman is the only one who tries to stand up. I mean, excuse
14 me, Captain Hocter, and when he does Colonel Oltman puts him in his
15 place. Chief Averhart and Chief Barnes can remember a lot of things
16 and so can Gunny Sergeant Blenis but none of them apparently can
17 remember a heated conversation between two O6s. But it's clear what
18 happened there and then that is, in fact, what resulted in PFC
19 Manning staying in these conditions. The group think was, hey we are
20 all doing everything right, that people above us say we are doing
21 everything right, I'm proud of you for everything you are doing.
22 Let's just keep this the status quo.

1 MJ: What is the defense's position on the testimony by Master
2 Sergeant Blenis and the Gunnery Sergeant Fuller and Staff Sergeant
3 Jordan that there was a thought to or there were these discussions of
4 taking PFC Manning off of POI and/or max custody about the week
5 before the 18 January 2011 anxiety of time?

6 CDC[MR. COOMBS]: I think each one of those perjured
7 themselves on the stand. That was never a thought process. That was
8 never a discussion and we have multiple examples of them not being
9 truthful on the stand which we'll cover but that was untrue. That
10 was untrue that they said because you've asked Captain Casamatta when
11 he went and talked to Chief Averhart and Chief Averhart kind of
12 supported the idea on the stand of hey, there was this discussion we
13 might be possibly thinking about removing him and then of course this
14 18 January incident happens. Well, if that were true, then they
15 would have said something to Captain Casamatta when he went there on
16 the 14th and said, hey look, what's going on. Why is he on POI? He
17 still doesn't understand why he is on POI. They would have said
18 something to him at that point and said, hey, you know, what--we are
19 debating on recommending him coming off. They didn't do that.

20 And so from our position we believe that there was a
21 callous indifference to the conditions that PFC Manning was under.
22 And you see that in moments of truth from each of the witnesses when
23 pushed on trying to articulate why they had him in these conditions.

1 Chief Barnes admitted that she had 16 years in and she was a CW2, you
2 know, one of the most junior commanders of a Brig and unlike Chief
3 Averhart if something happens she doesn't have a retirement to fall
4 back on. Okay, Sergeant Fuller exact quote, if something happened we
5 all knew we would be in trouble. We knew our actions would be
6 scrutinized. Staff Sergeant Jordan, his comment; and then Gunny
7 Sergeant Blenis goes off on a diatribe of hey look, I can't explain
8 that in my court-martial. I said, what if you relied upon the
9 doctors? The doctors saying, hey look, he is not a risk of self-
10 injury. You can take him off of POI. We all know that POI drove the
11 train for max. So you take him off of POI there really is no reason
12 to keep him on max. And----

13 MJ: I don't know if you are going to get into this later, but
14 the POI that drove the train for max, are you going to talk about
15 that later on?

16 CDC[MR. COOMBS]: Yes, Your Honor.

17 MJ: Okay. I'll hold off.

18 CDC[MR. COOMBS]: So, if they would have done that, Your
19 Honor, what would have happened then is Gunny Sergeant Blenis would
20 say, hey I'm going to be court-martialed. I can't rely upon the
21 doctors. That was his mind process. So, the safest bet was to keep
22 PFC Manning in max and POI something that they knew already above
23 them have been approved of and they said they were doing everything

1 fine, so the safest course of action for them was status quo. And
2 you see that the fact that, you know, people testified, in particular
3 Chief Barnes that hey, it wasn't so bad. He got to eat, you know,
4 everything I got to eat and other individuals saying, hey look, he
5 was treated like every other max and POI but the problem was he
6 didn't deserve to be on max and POI and the mental health
7 professionals were talking about the fact that this is an added
8 stresser. That this is problematic and the fact that PFC Manning's
9 spirit wasn't broke is actually kind of amazing. And that's really
10 the--the untold story here that from the defense perspective is the
11 amazing aspect of this entire case. They watched this young man
12 24/7. They took 5-minute notes on him. He was under constant
13 observation. And yet they could only point to a small handful of so-
14 called odd behaviors that the Brig psychiatrist and even the Brig
15 guards said is normal behavior for someone that's bored.

16 MJ: Well, who testified that that was normal behavior?

17 CDC[MR. COOMBS]: Two of the Brig guards did, Your Honor.

18 MJ: Which ones?

19 CDC[MR. COOMBS]: The Lance Corporal Tankersly testified to
20 that. He said that he didn't consider it to be odd behavior. That
21 he considered that to be normal for max. When I asked him why, he's
22 like, well they are in their cell 23 hours a day. They are bored.
23 And Lance Corporal Cline. So, they really truly thing--amazing thing

1 is that there wasn't more behavior. It was a 6 by 8 cell that we
2 could barely squeeze into this one little corner here. That was PFC
3 Manning's life for basically 23 hours a day. And the best they can
4 show is that he was playing peek-a-boo with the mirror, that he was
5 pretending to sword fight, that he was dancing. That's the best they
6 can show. The licking of the bars incident was explained by the
7 mental health professional and yet again ignored instead considered
8 odd behavior and used as a justification for his conditions. The
9 entire testimony up here, we didn't have these witnesses testify and
10 all had was the documentation that on the surface this actually looks
11 like, you know, they did due process, they followed their procedures,
12 but it's only when you hear the testimony that you realize that logic
13 left somehow did not ever get into the world of Quantico when it came
14 to PFC Manning. Whether it was, I don't know if it was the high
15 profile nature of it or if it was just simply a--the response to
16 Captain Webb for his earlier suicide, but all logic by anyone who
17 could effect change for PFC Manning was checked at the door when they
18 went into Quantico. And you can see that with, really when you
19 juxtapose PFC Manning's conditions at Quantico to what he was in a
20 week after he arrived at JRCF. And you can juxtapose the media
21 interest while at Quantico with the non-media interest when he is at
22 JRCF. And you can see the difference. And you can see the
23 difference with, and it's unfortunate that we didn't have Lieutenant

1 Colonel Hilton here in person, but you could hear the difference
2 between Lieutenant Colonel Hilton and anyone from Quantico.

3 So, the requested relief by the defense is first, dismissal of
4 all charges with prejudice. And you see from *Sabatini* and from
5 *Crawford* that that's a relief that this court can, in fact, give.
6 And in this instance based upon how PFC Manning was treated and the
7 complete breakdown of the system to include even the implicitly of
8 the government in not stepping in when they were aware of the fact
9 that there was a problem. Instead just being more concerned with
10 give us information so we can defeat the eventual Article 13 motion.
11 Not stepping in to say, you know what, wait a second, why is he in
12 max and POI.

13 MJ: Wasn't there a request from Colonel Coffman at some point
14 to the Quantico authorities to look closely at the POI?

15 CDC[MR. COOMBS]: There was and you heard from Colonel Choike
16 that that was basically dealt with, with a curt response, a one-page
17 response. That was intended to send a message and that message was,
18 hey look, you don't like it, you take him from me. You know, you
19 don't pick up a phone, you don't call me, you don't return my emails,
20 well, I intend to send a message back to you basically, hey, he's our
21 responsibility and until and unless you want to come down here and
22 take responsibility for him then we are going to do what we want to
23 do. And that--When Colonel Coffman got that response the follow-up

1 should have been well, no, wait a second, this is my Soldier and you
2 are going to have to give me more than basically this brush off. It
3 was clear exactly what Colonel Choike wanted to do because he
4 testified under oath that that was his intent.

5 And if this court doesn't believe that dismissal is
6 warranted then we request that you both consider 10 for 1 credit for
7 the time from 27 August forward to 20 April and you also consider
8 this if you are the finder of fact when rationing an appropriate
9 sentence.

10 MJ: If I'm the finder of fact?

11 CDC[MR. COOMBS]: Well, at this point you are going to be the
12 finder of fact, Your Honor.

13 MJ: All right.

14 CDC[MR. COOMBS]: So, just looking at the conditions, now all
15 these conditions are how PFC Manning was held because of max and POI.
16 And when you look at each of these in the abstract you think, okay,
17 this doesn't seem all that bad but when you see the cell that he was
18 in and you see the fact that he was there for 23 hours a day, he was
19 treated like a suicide risk even though the doctors was telling the
20 Brig that he wasn't and the best proof of that is once he gets to
21 JRCF, he's MDI and guess what, nothing bad has happened despite what
22 Master Sergeant Papakie predicted. There was no natural light for
23 his cell. That was clear. You could see from the video camera where

1 that window was given so-called light, basically 30 or so feet down
2 the hallway. And he was subjected to constant observation and that
3 in and of itself you look at that and you think, okay, constant
4 observation. I understand they were concerned he was going to harm
5 himself. But think about that for a moment. Every moment of your
6 life to include even using the facilities, is going to be subject to
7 being watched. And not watched usually by somebody that you can see,
8 but watched through a--through an observation booth that you can't
9 tell who's watching you. You can't tell who's behind there. And
10 your whole life is there and grant it this is jail, but here there
11 was no legitimate reason to put PFC Manning under this scrutiny. And
12 again it's a testament to this young man's fortitude that he didn't
13 break. He had to ask for the most basic of things, toilet paper,
14 soap, and you think about that, a kid doesn't even ask for toilet
15 paper but he had to. He was again treated like a suicide risk even
16 though all the evidence was to the contrary. When he was moved
17 around it was in full shackles. He wasn't allowed to exercise in his
18 cell because of his custody classification, you know, the government
19 initially said no one is allowed to exercise in their cell but Chief
20 Averhart admitted on the stand that no, that is in fact, due to his
21 custody classification. There was contrary testimony on the lane or
22 leaning against the wall. The government conceded that point in
23 their--in footnote 23 of their response motion, but the witnesses on

1 the stand took issue with that. He was not allowed any contact with
2 any other detainees. We've heard witnesses say that, oh, no there
3 were people--there were other detainees next to him. He could talk
4 to them. But again, Lance Corporal Tankersly and Lance Corporal
5 Cline both said there was nobody to his left or to his right and
6 their understanding was if the detainee wasn't immediately to your
7 left or your right, you did not get to talk to them. Even Chief
8 Barnes admitted that if they weren't right next to you you would have
9 to talk in a higher voice because of just the ambient sound and that
10 of course would be considered something that is prejudicial to good
11 order and you would be told to stop.

12 Now suicide risk added additional requirements and in both
13 instances when suicide risk was recommended to be stopped on 6 August
14 and when it was never recommended to begin on 18 January 2011, PFC
15 Manning was subjected to these additional requirements.

16 MJ: Let me ask you something on the 18th of January. Never
17 recommended to begin. Does the Brig commanding officer have the--or
18 the Brig o have the authority to put somebody on the suicide risk and
19 wait for the doctors to take him off?

20 CDC[MR. COOMBS]: He does and in this instance the clear
21 facts, based upon Chief Averhart's email, is he orders him into
22 suicide risk I believe around 1500 and then 20 minutes later Captain
23 Hocter arrives and makes the opine that 24-hour POI is the only thing

1 that is required. And that is later--And that's in Chief Averhart's
2 email plus it is also later memorialized by Colonel Malone that 24-
3 hour POI is all that's required. So, under the SECNAV Instruction he
4 should have been taken out of suicide risk on the 18th.

5 Now, all these conditions when you look at them again in
6 the abstract you might be able to say well, it's a jail and that's
7 just the conditions that he was under. But when you hear from
8 Captain Hocter, Colonel Malone, Captain Moore, and even Staff
9 Sergeant Jordan the government's own witness, these conditions that
10 PFC Manning was under, they can only equate to death row detainees
11 and PFC Manning wasn't under this for a short period of time he was
12 under these conditions for his entire time at Quantico. And the POI,
13 the defense took pains with each of the government's witnesses that
14 could talk about this of where POI came from and Chief Galaviz said,
15 look POI is not under the SECNAV Instruction, it's kind of a made up
16 custody classification but when you look at where POI comes under,
17 it's under admin segregation and all of the provisions under admin
18 segregation make it clear that this is supposed to be kind of a
19 temporary custody because of the added requirements. It's not
20 envisioned to be a long-term thing and in fact if you had to keep
21 someone on long-term custody such as POI it may be something that you
22 would look at putting that person into a psych ward. And that's
23 exactly what Lieutenant Colonel Hilton testified to. Her longest of

1 having somebody on a suicide risk and she said there wasn't a lower
2 POI standard was 7 days and that person ultimately went to a psych
3 ward. The rest of the witnesses each testified as to how long they
4 have seen POI and none of these witnesses saw anything anywhere close
5 to PFC Manning. Again, further evidence that logic was checked at
6 the door.

7 MJ: Well, refresh my memory, I thought Chief Barnes said that
8 she saw someone on POI status for close to the length of time that
9 PFC Manning was on it.

10 CDC[MR. COOMBS]: I asked her--She said I believe there is
11 somebody close to that time but I was, I think that was when she was
12 an enlisted and she wasn't entirely sure. And so then I said, well
13 let's talk about what you are sure about. How about since you have
14 been a Brig OIC? And she said a matter of a few days.

15 Here is the part where I was talking about POI basically
16 being controlled by max or visa-versa I should say. Once they made
17 the determination Chief Averhart and even Chief Barnes said their
18 Brig SOP, their basically Standard Operating Procedure would be if
19 you are in POI you would be held in max. And in this instance not
20 only did they in fact do that but Chief Averhart actually in his
21 weekly reports directed 3 consecutive weeks that PFC Manning remain
22 in POI until the 706 Board is done. I talked to Gunny Sergeant
23 Blenis about this because at the time this was given Gunny Sergeant

1 Blenis shared this order with the defense and I informed him that the
2 706 Board was not even appointed to resume its work at that point and
3 that would likely not resume its work until after the new year. And
4 at that point he said, you know, yeah I remember that general
5 conversation and I asked him, did you tell Chief Averhart that? He
6 went to great pains to say somehow that what is clearly an order was
7 not an order. Even Chief Galaviz looking at it said, you know what,
8 that sounds like an order to me. But Chief Averhart said, you know
9 what, I didn't articulate it the way I should have. I didn't clearly
10 state what my intent was. And when you look at what he wrote, what
11 other intent could you possibly mean other than until the 706 Board
12 is done he is going to stay in POI. And that again, is an arbitrary
13 factor that Chief Averhart placed on POI which would then land PFC
14 Manning of course in max under his SOP.

15 MJ: What are the 3 weeks of those orders, do you remember, that
16 language?

17 CDC[MR. COOMBS]: I do, ma'am. The first one was I believe in
18 like the 14th of December timeframe and then the 3 weeks subsequent
19 to that.

20 MJ: Thank you.

21 CDC[MR. COOMBS]: Yes, ma'am. So, you see that type of order
22 really does fall under the "not on my watch" position where nobody
23 wanted anything bad to happen to PFC Manning, and in and of itself

1 that could look altruistic where look, we are just trying to take
2 care of him. But the real goal here was nothing bad happen to PFC
3 Manning. The real goal was, look if something bad happens to him
4 somebody is going to have to pay the price and I don't want that
5 person to be me. And so, the safest course of action is let's keep
6 him in max and POI. If the Quantico Brig could have put him in a
7 strait jacket and in a cushioned room and had nobody raise any
8 complaints they would have done that.

9 MJ: And where's your evidence of that?

10 CDC[MR. COOMBS]: Based upon the fact that they ignored week
11 after week the Brig psychiatrist's recommendations. Based upon the
12 fact that if you look at it just as objective person reading even
13 Gunny Sergeant Blenis' own account of PFC Manning, week after week,
14 polite, courteous, respectful. Not the most talkative guy in the
15 world, but they are not saying there is any communication issues.
16 Gunny Sergeant Blenis gets up on that stand and he says, and I'll
17 cover this in a moment, but he says PFC Manning is the worse
18 communicator in his entire time other than a death row inmate. Where
19 is that in any of his weekly reports where you would expect to see
20 that? Nowhere. It's an *ex post facto* created reasoning in order to
21 further bolster a position of keeping him in POI.

22 And in--That's really the second prong of the Article 13
23 issue here. It was arbitrary. It was an arbitrary standard to keep

1 PFC Manning in POI. They didn't have any concrete facts to point to
2 other than behavior prior to PFC Manning's arrival, which in fact,
3 would warrant his conditions when he first got to the Brig, but
4 that's the whole point of mental health. When he was in Kuwait he
5 was put on medication. We heard testimony that that would take, on
6 average, 2 to 6 weeks to take effect and the doctor testified that
7 when PFC Manning started taking the medication he was seeing
8 improvements. And in fact when PFC Manning gets to Quantico you do
9 see improvements, so much so that both Captain Hocter and Colonel
10 Malone concur that PFC Manning doesn't need to be on suicide risk.
11 And then being very cautious they wait another month basically or
12 close to a month, where then they say look, he doesn't even need to
13 be on POI. And his behavior justifies that belief. Month after
14 month in Gunny Sergeant Blenis' counseling reports. But what happens
15 to PFC Manning is he's placed in a position of now he needs to
16 convince these individuals who are risk adverse to the point of being
17 absurd that he is not going to harm himself. And he's caught in this
18 catch-22 where if he doesn't do anything they say what are we missing
19 and they double down their efforts. If he does anything out of the
20 ordinary, they say, ah ha, that's what we are looking for. That is
21 proof that he is going to harm himself. And again they come up with
22 this now after the fact he didn't communicate enough with us. But
23 communication is a two-way street and I asked each one of these

1 witnesses, well did you go to him? Did you go to him and did you
2 tell him these things that you were concerned about? No. Chief
3 Barnes is the closest person to that but oh, by the way when she
4 tells him she--he needs to talk to her and he starts to she stops him
5 and says you are being disrespectful. And if you are disrespectful
6 to me that might wind up in your packet which is going to affect your
7 sentence. So, obviously PFC Manning knows that he speaks to her at
8 his peril. Gunny Sergeant Blenis testified on the stand that he
9 needed to be 100 percent convinced that PFC Manning would not harm
10 himself. Master Sergeant Papakie said I'm convinced and I believe
11 that if he were ever given an opportunity he would do something to
12 himself. There was no convincing Master Sergeant Papakie, the most
13 senior enlisted at the Brig. And Chief Barnes basically said and she
14 used Lieutenant Colonel Russell's mental health eval as her
15 justification for this is it's Manning's own fault. The ball is in
16 his court. He is not taking or availing himself of the opportunities
17 that he has to convince us that he's okay. He's not going to the C
18 and A Boards. He's not being talkative. He's not being open with
19 his counselor and all this happens again post-March 2nd where any
20 sane person would stop talking to these people and say, look, I'm not
21 going--I'm not digging my hole anymore. That's the first sane thing
22 you do when you know you are digging a hole is you stop digging and
23 that's exactly what PFC Manning did.

1 Perhaps the best evidence of the arbitrary nature of his
2 conditions is what the government actually thought was their best
3 evidence of we're doing the right thing. We are looking at this
4 weekly. Well the C and A Board was basically a complete sham as it
5 was set up. The form was prefilled out and you see that there's a--
6 there's a change in the form from what they initially used to what
7 they used on 21 January. And Chief Barnes said that she's the one
8 who basically directed this change. But amazingly that change
9 actually documents the detainee's election on whether or not they
10 want to appear. The first time that election appears PFC Manning
11 avails himself of the opportunity to appear before the board. He
12 testified he didn't know what to do. I mean, he showed up and they
13 said hey, it's your show. He wasn't prepared and he was nervous.
14 And that's when they grilled him and he makes a comment that they
15 later use against him being nervous. But the testimony that came out
16 from witness after witness is it's very rare that detainees show up.
17 And yet, this again, was something that Chief Barnes was using
18 against PFC Manning because he wasn't showing up enough.

19 MJ: Is it the defense's position that the Brig officials
20 concern after PFC made--PFC Manning made the comments that his
21 current statements that he may not be suicidal may be false, it is
22 not a legitimate concern?

1 CDC[MR. COOMBS]: No, and the reason why is when you look at
2 that whether you look at the CORMIS entry or the Word Document, you
3 see what they do. They say, okay look, you made this initial
4 statement at intake and PFC Manning says, you know, that's--that was
5 probably false. And I think it's Gunny Sergeant Fuller who then sets
6 him up by saying, well, if that was false, how about what you are
7 telling us now could that be false? And PFC Manning apparently if
8 you believe what they wrote said yes. And they just leave it at
9 that. They don't--they don't----

10 MJ: Well, they asked----

11 CDC[MR. COOMBS]: ----follow up.

12 MJ: ----him if he understood the question.

13 CDC[MR. COOMBS]: Right, but they don't follow up. That would
14 be something where you would say, wait a second. Are you telling us
15 that you are suicidal right now? Are you telling us that you might
16 harm yourself right now? There are a million of questions that you
17 would follow up with that. You look at the very end of that CORMIS
18 entry and you see that PFC Manning was stuttering, they document
19 that. He was nervous. His hands were shaking and they document
20 that. He is standing up now for the first time in front of the board
21 of three. One of them should be his advocate. And he's getting
22 grilled. He's getting peppered by them and he's obviously nervous.
23 And it's clear if you are looking at that everything that Manning--

1 that PFC Manning has said and everything that he has done is just the
2 opposite of that, that I'm going to harm myself. The only way that
3 you can reconcile the two of those statements is he answered yes not
4 fully understanding the question asked of him. But if they were
5 really truly concerned about that the proof is in the pudding on what
6 they do afterwards. Why not at that point go right to the doctor
7 saying, look, he just admitted to us that he may be, in fact, not be
8 truthful when he's saying he's not going to harm himself. He said
9 that that may be false. Why not at that point do some documentation
10 to follow-up on this statement or why not ask the logical, follow-up
11 questions other than do you understand what we just asked you? Yes.
12 The reason why they didn't ask any of those follow-up questions is
13 because they've got the information that they wanted. It's what
14 maybe a good advocate would do in asking a question and getting the
15 answer from a witness and saying, okay, I'm going to leave that
16 alone. I've got my answer and that's why we have cross-examination
17 where you then flush it out. If I were there, I would have asked PFC
18 Manning, did you really in fact mean that. Did you really in fact
19 mean that you were not being truthful when you said that you were not
20 going to harm yourself? And maybe if you weren't so nervous at that
21 point he could have answered that question. But--So you see the C
22 and A Board they started documenting this really in January of 2011.
23 And that's really when you look at the emails again that we gave you

1 you see that they were made aware that the defense was going to get
2 their documentation basically 3 days before they start now using
3 these forms. And the so-called-process, you have the C and A Board
4 Membership, the Brig OIC selects them, that's okay; but you have a
5 counselor, in this case Gunny Sergeant Blenis who pre-fills out the
6 form to include the recommended, you know, status. It's all filled
7 out. Chief Barnes says, you know what, you don't fill out anything
8 on the lower custody status, you never check that and you will see
9 when you look through that, ma'am, none of those are ever checked.
10 The reason why is it's filled--the form is filled out to support the
11 recommended status. Chief Galaviz was the only one with a little bit
12 of perspective when he says, yeah, I know, the counselor shouldn't be
13 a voting member of the board because you already know the counselor's
14 vote. No counselor is going to make a recommendation on a status and
15 then vote against their own recommendation.

16 MJ: Is there anything in the SECNAV that prohibits--Instruction
17 that prohibits it?

18 CDC[MR. COOMBS]: What I would say is the proponent--one of
19 the proponents of the SECNAV said that that would be improper.
20 Saying, no, you need to in fact--the counselor goes there and
21 basically is the person who knows the detainee the best, supposedly.
22 And goes up and makes a recommendation to the voting members. And
23 then you should have three voting members who then make a vote. But

1 Gunny Sergeant Blenis was consistently the senior board member and
2 then as the process went after he ticked all the boxes that supported
3 his outcome then he apparently voted and then he passed it to the
4 next junior member. They sometimes spent 1 minute to a max of 10
5 minutes on this decision. And then when it goes up to Chief Averhart
6 he says he doesn't even look at any of the forms. He was saying
7 basically he was signing some sort of document that was approving
8 everybody's status, just had PFC Manning on one line, but not looking
9 at this whole little documentation. And that makes sense.

10 MJ: If he is signing a document how is that vocal approval?

11 CDC[MR. COOMBS]: Well, because he's not signing the Brig--the
12 C and A Board's results because there is no form to sign. He's not
13 signing that like Chief Barnes ultimately does when she starts using
14 the Brig form they are using. What he's doing is, and I forgot the
15 terminology used for the form but it's some form that has every
16 detainee and their status and he's just signing off and saying, yeah,
17 that's what I want him in. That's what I'm going to put them in.
18 But he's not making an approval of the C and A Board.

19 MJ: Is that not the functional equivalent?

20 CDC[MR. COOMBS]: I would say no because the C and A Board
21 should be in fact, giving their recommendation to him and saying,
22 okay, this is what we considered and then ideally I would think the
23 process would be that he would look at what the board considered

1 maybe ask a few questions. The process that he described was just
2 some sort of form that had every detainee and what their status was.
3 And if he wanted to change it he would, otherwise he would sign off
4 on it. And Gunny Sergeant Blenis was in fact not PFC Manning's
5 advocate. He was supposed to be PFC Manning's advocate. He was
6 supposed to be his counselor. He was supposed to be the person
7 looking out for him though we see multiple instances where he's not
8 doing that. He's in fact doing just the opposite. He is
9 unprofessional. He is somebody who is not advocating for PFC
10 Manning. But worst of everything is he's lying to PFC Manning. He's
11 telling PFC Manning that the doctors are recommending, they are the
12 ones who are recommending that he remain on POI. And PFC Manning,
13 this explains why you have a delay in his complaints. PFC Manning
14 believes that the doctors are the ones who are saying you need to be
15 on prevention of injury. And at that point, you know, okay, if the--
16 if some mental health professional believes I need to be on
17 prevention of injury then what are you going to complain about? It's
18 only when PFC Manning starts to ask questions and starts to say,
19 well, wait a second, that's not what I'm hearing does he then believe
20 well, perhaps the person that he testified on the stand, PFC Manning
21 testified that Gunny Sergeant Blenis was a nice guy. He liked him.
22 And all the while this is what Gunny Sergeant Blenis' actually doing.

1 Gunny Sergeant Blenis on the stand comes up with and you see
2 other witnesses who come up with kind of the same story of all of a
3 sudden PFC Manning is this person who will never speak to. Will
4 never talk to me. Who is, you know, is just a yes/no answer and
5 that's it. The worst communicator he has ever seen other than
6 somebody that he had on death row. But again, nowhere in his
7 counselor notes is this information ever recorded and you would
8 expect that he would record that.

9 MJ: The counseling notes do say that he is un--PFC Manning is
10 uncommunicative and is guarded.

11 CDC[MR. COOMBS]: At times, yeah. Other times it talks about
12 oh, we had a good conversation about, you know, March Madness or we
13 talked about X, Y, or Z. And I asked Gunny Sergeant Blenis, well is
14 it possible and you had the opportunity to see Gunny Sergeant Blenis.
15 Gunny Sergeant Blenis and PFC Manning didn't have the same interests.
16 The main interest PFC Manning had was computers and some sports.
17 Gunny Sergeant Blenis and him didn't have that same interest so I
18 said is it possible that maybe you didn't have a lot to talk about?
19 But when you take a look at other individuals such as the doctors,
20 Captain Casamatta, uh, the chasers who were taking him out, PFC
21 Manning didn't have any problem talking to these people. So, again,
22 communication is something that has been used now as a convenient
23 hey, this is--this is what we are going to say really happened. But

1 it's not supported by the facts. It certainly is not supported by
2 Chief Barnes' testimony where she says when she first came there PFC
3 Manning was talkative. He complimented her on her hair. They would
4 joke a little bit. He was like every other detainee fine. And yet
5 for the first month she didn't do anything. When she starts to say
6 the communication goes downhill again, that's coincides with
7 basically the March time period and that's---there's a good reason for
8 the communication to go downhill at that point.

9 We see the log book entries. The reason why those started
10 Gunny Sergeant Blenis testified that he was just walking in
11 apparently the SQ1 area and overheard guards talking about various
12 things that PFC Manning was doing. And that's when he documented
13 that and you see that in his weekly report, November. The first time
14 he documents anything about so called odd behavior but after that
15 point shortly thereafter Chief Averhart directs that any odd behavior
16 is going to be documented now in a separate log book and it's going
17 to be part of their 5-minute annotations but all of the behavior
18 again as you heard from Lance Corporal Tankersly and Cline wasn't odd
19 behavior. The guards weren't reporting this. It was only by
20 happenstance that Gunny Sergeant Blenis overheard something and then
21 said, oh, wait a second, we need to start documenting this. And
22 every one of their so-called odd behaviors was run by either Captain

1 Hocter or Colonel Malone. And neither one had any issue with this
2 so-called odd behavior.

3 No one ever goes directly to PFC Manning though to talk to
4 him about that. I asked Gunny Sergeant Blenis, if you were concerned
5 about that did you go directly to PFC Manning and ask him about the
6 behavior? No, I didn't. The person who wants communication never
7 went directly to PFC Manning to ask him about an issue that a
8 counselor should ask him about if he's concerned, if he's an advocate
9 or certainly if he's using that as a justification for his
10 recommendation to the Brig OIC. Did Chief Barnes or Chief Averhart
11 ever go to PFC Manning to talk to him about the so-called odd
12 behaviors? No. He never did. No reason. No reason was given for
13 not going to PFC Manning and yet the same thing that they are saying
14 PFC Manning is faulted for, a lack of communication, can be laid at
15 their footsteps as well. Not going and asking a simple question, we
16 hear you are sword fighting or we hear you are, you know, you are
17 just setting and staring at the walls. Is everything okay? But
18 again all this stuff is considered by the mental health
19 professionals, people that you would expect would raise a flag if
20 there was in fact a concern. Gunny Sergeant Blenis on the stand kind
21 of a couple of times shows his logic and this is the person again
22 that pretty much holds the keys to PFC Manning's fate at least at the
23 C and A Board. He talks about the fact that he would be a puppet if

1 he followed the recommendation of the Brig psychiatrist which didn't
2 make any sense. But more startling is when it came to the other
3 factors the four family ties, asked what could PFC Manning do about
4 that? Well, you build up the family ties. You know, if he doesn't
5 do that, if he just has poor family ties is that always going to be a
6 factor? Yes, it is. And I'll talk in a moment how these factors
7 really circumvent the true question and that is whether or not PFC
8 Manning qualifies for max. That being he is dangerous, violent, or
9 risk to escape.

10 Blenis then testifies that the statement that PFC Manning
11 made on 21 January completely dumbfounded him and it was huge for me.
12 Those were his words and yet he never goes to PFC Manning or even the
13 doctors to talk about this so-called huge statement. The always
14 planning and never acting, I say well isn't there a time period where
15 that would no longer be relevant for you? And he responded always is
16 always. That was always going to be an issue for him. And most
17 troubling is when we talked about the one incident of the so-called
18 licking the bars. The only time that's ever documented was in the 23
19 November counselor notes. It's documented not from a report, it's
20 this is one of the behaviors that he overheard. What he hears from
21 the guards is PFC Manning was sleep walking. And this was, in fact,
22 something that was brought up with the doctors and the doctors said
23 that was a side effect of the medication. I asked Gunny Sergeant

1 Blenis if he heard that would he still consider that. He said, yes.
2 I said, well, what if it was a doctor that you totally trusted that
3 you had 100 percent trust in and he said, look this is not a mental
4 illness this is just simply a side effect of medication. He still
5 said no, I would consider that. That again, is the person that PFC
6 Manning somehow has to convince 100 percent that he is not a risk of
7 self-harm.

8 Fuller and Jordan for the most part, they testified that
9 they went along with Gunny Sergeant Blenis. He was the person who
10 knew him the best. He was their superior. And so when the boxes are
11 checked for them they don't go and check anything else. They don't
12 check any of the lower custody classifications. They don't add any
13 detail. All they do is check yes for their support and sign their
14 name. Again, when you look at the forms being pre-filled out an
15 issue where and even under the best of circumstances that should
16 raise an eyebrow to have it pre-filled out. But to put Gunny
17 Sergeant Blenis as the person as the senior member on the board
18 clearly is problematic but when you look at what he points to when he
19 checks it's all conduct that PFC Manning has no control over. Stuff
20 that happened in Kuwait. Stuff on his intake questionnaire. No
21 control over any of that stuff. The so-called odd behavior----

22 MJ: How does he have no control over what he places on the
23 intake?

1 CDC[MR. COOMBS]: Because at the point that he--again, his
2 testimony was that he was told he had to put something there. And
3 grant it, that wasn't the smartest thing to write down but when you
4 write that down then okay, that's--that is a time and period where
5 now you have that written down and that is a fact. Well, they are
6 using that same fact month after month to support their decision and
7 he has no control over changing that. Those are the facts. He can't
8 control the fact that he had a break down in Kuwait. He can't change
9 that but all he can do is what he's doing that day and every day he's
10 doing what he's told. Every day he is a model detainee. Every day
11 when the doctors when they come see him they are saying he is not a
12 risk of self-harm. Those are things he can control and those are
13 discounted. And the disproportional weight is applied to these
14 factors. Things that he can never change, the poor hand--the poor
15 home and family relationships, he can't change that and yet that is
16 going to be constantly used against him. The seriousness of the
17 charges, he can't change that and yet they use that against him.
18 Potential length of sentence which is basically the same thing, he
19 can't change that. And so for 9 months he is kept in max and POI and
20 again the testimony showed that the POI did drive the train on the
21 max. Everyone testified that PFC Manning was not violent or
22 dangerous. There was no testimony and I asked each of the witnesses,
23 any concern of him being violent, any concern of him being dangerous?

1 No, no. Then we go to escape risk. He's in Quantico. Did he ever
2 try to escape? Did he ever do anything? No, no. No escape risk.
3 Very compliant, very respectful. And then----

4 MJ: Well, let me stop you there for just a minute.

5 CDC[MR. COOMBS]: Yes, Your Honor.

6 MJ: Some testimony showed that the POI was driving the train on
7 the maximum classification, witnesses that--some of the witnesses
8 testified that they looked at the seriousness of the offense, low
9 tolerance for frustration, et cetera. Do you remember which, if any
10 witnesses specifically said that their maximum determination was
11 based solely on the POI?

12 CDC[MR. COOMBS]: Both Chief Averhart and Chief Barnes said
13 that POI would make you max. That that would be the default and that
14 in their mind was the standard. The only time that would ever change
15 would be when they received Chief Galaviz's memo that said well, wait
16 a second, you need to look at, you know, the handling instructions
17 separate from the custody so you can have, in fact, a POI/MDI. The
18 key thing here when you look at all the so-called justifications
19 though for max, when they were looking at the low tolerance of stress
20 or the seriousness of the charges; it's the defense's position that
21 these factors the seriousness of the charges, low tolerance for
22 stress, the potential length of sentence, these are not factors that
23 get you to max. These are factors where you can basically once you

1 make the determination is the person violent or dangerous, is the
2 person an escape risk? Then these other factors, the seriousness of
3 the offense, the low tolerance for stress are factors that are non-
4 inclusive or exclusive lists that you can use in order to justify the
5 decision. But it's the defense's position under the SECNAV
6 Instruction certainly with the SECNAV saying only a small portion of
7 detainees should be max that the first hurdle that you've got to get
8 over is, is this person violent or dangerous, or is this person an
9 escape risk. Because you could have somebody come into jail with a
10 non-violent offense, much like PFC Manning, with a potential length
11 of sentence that is, you know, out in the, you know, stratosphere,
12 maybe do a--like a Bernie Madoff type offense where it's a white
13 collar type crime and you've got a potential length of sentence
14 that's quite long. You wouldn't put that person in max. There's no
15 reason to put that person in max unless you say they are dangerous,
16 violent, or an escape risk. And the second little prong which, scary
17 enough even Chief Galaviz didn't seem to understand and the
18 government continues to argue the national security aspect. There's
19 a conjunction there that makes that relevant only if a person is an
20 escape risk. Because if they are an escape risk then they go into
21 max if their escape would cause loss of life, property, or danger to
22 national security. So, when you look at that provision, that is not

1 a separate national security, we put him in max custody authorization
2 that the government has tried to argue.

3 So, these factors that are checked, the random factors
4 which again are all basically the same one time and time again when
5 you look at them on the C and A Board, they in and of themselves do
6 not justify max. You have to make that first determination. And so,
7 in PFC Manning's case, you know, if he were a--just actually charged
8 with a one spec AWOL say, and for some reason was in pretrial
9 confinement, you know if he had low tolerance of stress, I guess he
10 would have the seriousness of the charges necessarily, but obviously
11 you wouldn't put him in max based upon low tolerance of stress. You
12 would do that because you thought he was a potential danger or
13 violent detainee or an escape risk. That's the only reason you would
14 put him there.

15 Now, here is the most troubling aspect that you can
16 only really truly explain after looking at the counselor's behavior
17 with an answer that they must have known that, look, this is the
18 status. This is the safest status to keep him in because nothing bad
19 can happen to us personally if he is in max and POI. And that is the
20 ignoring of their own doctors. Captain Hocter, Colonel Malone
21 consistently recommended taking PFC Manning off of POI. Lieutenant
22 Colonel Russell's opinion is actually consistent with Captain Hocter
23 and Colonel Malone. When you look at his opinion he says, look what

1 I'm seeing is a talkative person, doesn't seem to have any mental
2 health issues, he in fact checks all the appropriate boxes that are
3 consistent with what Captain Hocter and Colonel Malone have checked.
4 The reason why he says POI should be continued is because of the
5 story that he's been fed by Chief Barnes and her staff. And he says,
6 well, based upon what they have told me, you know, he's not
7 communicating he's significantly drawn down his communication, he's
8 withdrawn, they are saying----

9 MJ: Is the defense contesting that, his communication
10 deteriorated?

11 CDC[MR. COOMBS]: No, I think that was the natural
12 consequences of 2 March.

13 MJ: But it did deteriorate?

14 CDC[MR. COOMBS]: Sure. Because at that point when he figured
15 out was look, every time I talk to them, whether it be at the C and A
16 Board or pulling aside Master Sergeant Papakie and actually having a
17 heart-to-heart and feeling like I'm getting to him something bad
18 happens to him. So, I'm not going to--I'm going to have to give up
19 actually talking to these people because there's no way I can
20 convince them of anything. And you see a big change in behavior when
21 he gets to the JRCF. The first sergeant and Captain Casamatta both
22 testified much happier, much more talkative, and that's because he's
23 in MDI. And that's the first time really that he's in a position

1 where there are people who are willing to look at the facts and
2 listen to their mental health professionals. But Lieutenant Colonel
3 Russell's opinion is swayed by what he is hearing from the actual
4 Brig and the important thing here is if Lieutenant Colonel Russell
5 had the same history that Colonel Malone did would his recommendation
6 be the same. The defense's position would be no. Because Colonel
7 Malone testified that he got to the point where I just agreed to
8 disagree. And that's where he got with Chief Barnes.

9 So, you see that there is a wide disparity in what they
10 believed Captain Hocter was doing. And Captain Hocter really is the
11 victim of this entire Article 32 hearing in short of PFC Manning
12 because everybody wants to throw Captain Webb's suicide at Captain
13 Hocter's feet and they want to say he's the guy who came in for 10 to
14 15 minutes, never did anything, didn't do a thorough review and just
15 left. And yet that is inconsistent with other individuals who said
16 he was there for the hour with PFC Manning. That's inconsistent with
17 PFC Manning's testimony. But, the most problematic aspect here is
18 the command makes--they don't even make pretense about despising
19 basically Captain Hocter's opinions. Chief Averhart says, you know,
20 I didn't trust him. And we have the email where he's saying that
21 Captain Hocter's just trying to cover his own six, his own back. And
22 he sends that email to his subordinates and so it's clear that Gunny
23 Sergeant Blenis and the subordinates that received that email know

1 that whatever Captain Hocter is saying isn't going to sway their OIC.
2 And so when Gunny Sergeant Blenis goes on the C and A Board, what
3 weight do you think he really gives to Captain Hocter's
4 recommendations. And then you see Colonel Oltman also testified that
5 he blamed Captain Hocter for Captain Webb's suicide. And I believe
6 it was Gunny Sergeant Blenis but I'm not for sure exactly as my
7 memory is failing me on this but one of them testified that there was
8 an investigation and lo and behold the Brig was not held at fault.
9 Then I said, well, okay, if the Brig wasn't held at fault that must
10 have meant that Captain Hocter was not held at fault either. And he
11 wouldn't even give me that. Well, Your Honor, no it was just the
12 Brig. The Brig wasn't held at fault. But, compare that and try to
13 reconcile that statement with what they tell PFC Manning when PFC
14 Manning says, look, I know Captain Hocter and now Colonel Malone is
15 recommending me to come off of POI. They turn to him and they say,
16 who's here every day? Who sees you every day? We are. He's here
17 for an hour at best and gone. He's a recommendation but we are here
18 every day. Why wouldn't that same mentality apply to Captain Webb?
19 They were there every day. They saw him every day and yet they
20 didn't see anything. But they don't put any fault on them at that
21 point. Instead they throw it right at Captain Hocter's feet. And
22 Captain Hocter in probably the most painful testimony you hear from a
23 person of his rank, is if they just would have told me. If they just

1 would have told me that they didn't trust me I would have stepped
2 down. I would have resigned.

3 MJ: Well, he also testified that he tried to resign, didn't he?

4 CDC[MR. COOMBS]: Before this. Long before this. But he said
5 he would have resigned and Chief Averhart even admitted that yes, I
6 can see how it's unfair to PFC Manning that he had a doctor that I
7 did not trust. And he said oh, yes, if I had a doctor that I trusted
8 that would have been a huge help. That would have been something I
9 would have liked to have. And yes, I could see how that would then
10 actually helped PFC Manning if a doctor I trusted said he's not a
11 risk of self-harm.

12 What happens then is based upon how they viewed Captain
13 Hocter again, the Brig staff now doesn't look at Captain Hocter as
14 being a good source of information and so his weekly evals are not
15 weighed. They are not trusted. And no one tries to replace Captain
16 Hocter. I asked Chief Averhart, look, you know, I know--he said it
17 wasn't his job to try to replace him. That he did go to Colonel
18 Oltman but if you have the Brig psychiatrist that you don't trust why
19 not replace him? Why not ask your chain of command and say, look,
20 this guy is coming in for 10 minutes for tops and leaving. He's
21 worse than not having somebody if that were true. We want somebody
22 different. We need somebody that we can trust and that would have
23 been then obviously pushed up the chain of command.

1 MJ: Were there--at what point the email traffic indicates that
2 through Captain O'Neill or Captain Neill that there was attempts to
3 get additional mental health support for the Brig. When did those
4 begin?

5 CDC[MR. COOMBS]: I believe most of those emails, ma'am,
6 started right around the same time frame of the charges, the new
7 charges being preferred and I think the genesis for this was Colonel
8 Malone was not available at the time that the command wanted him
9 there. Once they found out the new charges were going to be served
10 on PFC Manning and the 138 response was they wanted Colonel Malone
11 there and Colonel Malone was on emergency leave. And I think that
12 might have been, if memory serves me correct, the reason why at that
13 point they said we need somebody that we control. And so Lieutenant
14 General Flynn actually gets involved in that and they push that all
15 the way up to the highest levels of getting somebody. And then I
16 asked if that was just for PFC Manning and the idea was no, we wanted
17 somebody. Then obviously once PFC Manning goes to the JRCF the push
18 for a full-time mental health professional goes away and then
19 subsequently they close down.

20 You know, Chief Galaviz talked about the fact that if you
21 have somebody you didn't trust you should have gotten a second
22 opinion, and if you didn't get a second opinion then you should have
23 replaced the doctor. So, Chief Averhart, once he kind of looks at

1 everything, he basically defaults to, I'm going to keep PFC Manning
2 on max and POI and that's the position that PFC Manning stays on and
3 when I pressed him to try to give reasons for why he had him on POI
4 and why he had him for max, those reasons were not anything that he
5 could rattle off. And you would expect that knowing that he is going
6 to come and testify on this issue and knowing that apparently every
7 week he's looking at this he would be able to articulate precisely
8 why he had PFC Manning on max and precisely why he had him on POI.
9 But the telling email for his 138 complaint that he sends to Gunny
10 Sergeant Blenis is he's asking him to draft a reason. Give me a
11 reason why we have him on max and POI. Use the template I have here,
12 make any changes you want and then send it back to me. And again as
13 I kept giving him the opportunity and open-ended questions, just tell
14 me why, what were your other reasons. Everything he could point to
15 were factors that again PFC Manning could not really control. And
16 there has to be a time limit on those factors. The question this
17 court should ponder for a moment is if PFC Manning didn't leave
18 Quantico on 20 April and was still at Quantico today what would his
19 custody status be?

20 Now, Chief Averhart comes up with, and a couple of the
21 other witnesses Chief Barnes does this as well, for the very first
22 time, nowhere in any other sort of email traffic nor is there
23 anything in the 138 responses, but they come up with a claim that now

1 he is on max and POI for his own protection. Even though there is
2 protective custody and they claim that, you know, we are concerned
3 that there's somebody else that's going to harm him, someone who is
4 patriotic as a confinee is going to take issue with what PFC Manning
5 is charged with and they are going to harm him. When I pushed him
6 for details on that did you hear anything from any of these detainees
7 to indicate that anybody had ill-will towards PFC Manning? No,
8 didn't hear anything. And again when you also push him for well, you
9 wouldn't put him in max for protective custody right? You would put
10 him in protective custody. Well, yes, okay. Again, not a reason
11 that was ever given except for on the stand.

12 Then they claim again the lack of communication. The only
13 documentation of lack of communication to the point where you would
14 say we are now concerned that we can't accurately gauge whether or
15 not he's going to harm himself is after the March 2nd incident. And
16 the defense concedes after that point PFC Manning does stop
17 communicating. He is still respectful. He is still compliant. He's
18 not to the level of some of the accused's in the cases we have cited
19 where they are confrontational with the Brig staff or their not
20 communicative with the mental health professionals. He's still
21 respectful. He still responds. He just doesn't give them any more
22 information than needed which is a smart thing to do because when he

1 does give them more information that information is ultimately used
2 against him.

3 Now, you have some abnormal behavior that Chief
4 Averhart tries to point to again when I tried to say, okay, what is
5 the abnormal behavior? He has difficulty articulating any of the
6 behaviors and when he does, each one of those behaviors is something
7 that has been considered by a mental health professional or has a
8 very logical non-mental health reason for why you would be doing
9 that. And you see when he talks again about his order for the 706
10 Board his actual words as I misarticulated, that's what he's saying
11 for what he wrote down there. I asked him then, okay, how would you
12 have articulated it now on the stand? He basically says the same
13 thing. Well, he stays in POI until the 706 Board is done. Then I go
14 right back to him, okay, then you are ordering him to stay in POI
15 until the 706 Board is done. No, I'm not, I'm not directing, I'm not
16 ordering that. It's clear that that's what he ordered and Gunny
17 Sergeant Blenis knew that. And Gunny Sergeant Blenis is the senior
18 member on the board and he said that he didn't convey that to anyone
19 else but again, the proof is in the pudding.

20 Then you get the 18 January 2011, incident. And the
21 facts that come out it's clear that something happens to cause PFC
22 Manning to have an anxiety attack. And the best source of
23 information hear isn't any of the witnesses that testified. It is

1 the actual videos that the court got to see. Because at that point
2 no one can say that PFC Manning is so forward thinking to know that
3 eventually this is going to be an issue, an Article 13 motion, and
4 what I say here I'm going to set this up to say that it was the
5 guard's fault. No one would ever make that allegation. So, you see
6 what he says on the video. Look when the guards came to me they were
7 anxious. I could tell they were--they seemed to be anxious.
8 Something seemed to be different. And them being anxious made me
9 anxious. And Lance Corporal Tankersly couldn't recall very much,
10 Cline couldn't recall very much. But the incident reports support
11 this. Even Gunny Sergeant Fuller's incident report supports this
12 fact where once they get there PFC Manning is confused. There is
13 something about that day that caused him to feel different than any
14 other day and that results in him having an anxiety attack. Everyone
15 supports that fact. They switch out Tankersly and Cline. Again, for
16 the proof that there is some issue between those two guards and PFC
17 Manning. And they put two new guards there and PFC Manning completes
18 his rec hall without incident. He goes back to his cell. Everything
19 is fine. He is then sitting on his bunk just reading and that's when
20 Master Sergeant Papakie comes up and asks him questions. And PFC
21 Manning, again this is within a half an hour of all this stuff, but
22 you see Master Sergeant Papakie and then later Gunny Sergeant--excuse
23 me, later Chief Averhart through their questions invoke another

1 anxiety attack. Because Chief Averhart doesn't say, just is
2 everything okay? He says, is everything okay? Yes, yes, sir. Are
3 you sure everything is okay? Yes, sir. You have no problems? So he
4 asks him several times and that's the whole issue with PFC Manning
5 the--what happens on that day it is amazing that day didn't happen
6 multiple times earlier because up to this point he's been under the
7 same conditions for over 6 months. And he says to Chief Averhart, I
8 don't understand why everyone is so concerned about me. I don't
9 understand why I'm always being watched. He points to the
10 observation room, he says, I don't get that. I don't understand
11 that. And that's when another anxiety attack happens. Now what's
12 said, whether or not Chief Averhart raises his voice, you know, it
13 looks--it could have been his deep voice or he could have raised his
14 voice, but regardless of what's said, PFC Manning has another anxiety
15 attack. And what's interesting is the testimony that comes out both
16 from Master Sergeant Papakie and from Chief Averhart. Master
17 Sergeant Papakie's first version of the events kind of support Chief
18 Averhart. A violent, striking himself, almost head butting the front
19 of the fence of the gate to his door. He describes in kind of detail
20 this crazy scenario and then when he's confronted with his incident
21 report he folds quickly. Okay, okay, no, no, no, yeah, what happened
22 in the incident report happened. That's--Yes, that's the, that's
23 what the, that's what happened. And what does he describe happening?

1 PFC Manning raising both of his hands to his head and slapping the
2 side of his head. Exactly what PFC Manning testified to. Then you
3 get Chief Averhart up there and his version of the events is
4 basically an editorial license on Master Sergeant Papakie's first
5 kind of crazy version. He's talking about PFC Manning actually
6 striking himself with a closed fist in the face repeatedly and in the
7 head. So, after that then you get a--Chief Averhart saying, all
8 right, code blue. Which is going to be a forced-cell extraction. He
9 says, you know, special move SR. So he puts him on suicide risk and
10 the question that I asked then of Galaviz is what would be a suicidal
11 gesture to warrant even putting a person on suicide risk? And if the
12 facts were that somebody out of frustration just put their hands to
13 the side of their head, I don't think anyone would say that's a
14 suicidal gesture and that is what happened. So, when you look at it--
15 ---

16 MJ: Well, he would also have to take into consideration what
17 happened earlier in the day. Wouldn't that be true?

18 CDC[MR. COOMBS]: You would and even there, there wasn't a--an
19 intent to harm oneself. And you have within 20 so minutes the
20 doctors coming in to say it's an anxiety attack. And you also--if
21 you took into account what happened that day, you would also have to
22 take into account the fact that he completed his rec hall without
23 incident. So, then you get--again, probably the best proof the

1 video. Here is a person who apparently cannot talk to anybody, is
2 left to simple yes and no's, is acting very, very crazy and bizarre,
3 violently striking himself, and yet within minutes of this so-called
4 activity you see clearly PFC Manning standing in his cell at parade
5 rest talking to Master Sergeant Papakie. Very respectful. But also
6 very articulate saying, I don't understand. I keep--I just want to
7 get off of POI. I don't understand what I need to do. I'm telling
8 you I'm getting increasingly frustrated. Every day I'm thinking to
9 myself, what do I need to do to get off of POI. What do I need to do
10 to get off of POI. That whole conversation with Master Sergeant
11 Papakie and later with Gunny Sergeant Blenis, the lies anything they
12 said on the stand about PFC Manning and his ability to talk to them.
13 And when you look at him on that day there are no injuries from
14 striking himself in the face. Chief Averhart said, oh, I think we
15 might have had a Corpsman take a look at him or whatnot, they didn't
16 have anyone come take a look at him because he never struck himself
17 in the face.

18 Then you get the 21 January C and A Board and we talked
19 about this false thing but an issue here that is surprisingly absent
20 from his 21 January C and A Board is where do they ask him about 18
21 January. Wouldn't that be a good thing to ask him about if PFC
22 Manning actually struck himself in the face and was trying to head
23 but the front of his cell? Wouldn't that be something well, look,

1 you know we could talk about this statement that you made on 29 July,
2 but actually let's talk about something you did just 3 days ago and
3 let's talk about that. But they don't talk about that and that's
4 because 3 days ago was what PFC Manning said happened. 3 days ago he
5 had an anxiety attack based upon the guards being for whatever reason
6 more rough with him then on previous days and having some sort of
7 anxiety towards him, whether that is because of the protest or
8 something else. Maybe they are just having a bad day, who knows.
9 But after this obviously Captain Hocter saw him on that day and so
10 did Colonel Malone and you see PFC Manning's behavior just apparently
11 minutes after this so-called meltdown and he's fine. But they never
12 address this issue with him at the C and A Board.

13 Then Chief Barnes arrives and what must have been for PFC
14 Manning an almost a halleluia moment. I've got somebody new. I've
15 got somebody who is no longer Chief Averhart, who will actually maybe
16 talk to me. And Chief Barnes does talk to him. And she says he
17 talks to her, compliments her on her hair, they are talking, not a
18 problem. And she says basically hey, look, I have no problem taking
19 off POI and I'm going to look at everything and well, I'm not a
20 cookie-cutter-type person and we are going to go ahead and take a
21 fresh look at you. But what she fails to tell him is, you know what,
22 I know that Lieutenant General Flynn is involved in all this stuff
23 because I know my weekly reports that I'm going to be doing on you go

1 up to him. She fails to tell him that, you know what, on 14 January
2 I was in the Brig and I heard Colonel Oltman say that you were going
3 to be basically on max and POI indefinitely. She doesn't tell him
4 about any of that stuff, but her conduct speaks that, that is exactly
5 what she knew. Because she is the youngest warrant officer to take
6 over as the Brig OIC, as a CW2 she has 16 years in. She is not going
7 to put her career at risk for PFC Manning.

8 Within short order despite what she testified on the stand
9 of trusting doctors, it's clear from the emails that you had she
10 didn't trust Colonel Malone. She disagreed with his decisions to
11 take PFC Manning off of medication. She voiced those disagreements
12 with Colonel Oltman. She also believed that, you know, if you are
13 going to be suicidal and you need medication to stop being suicidal
14 in her mind said, that the second you take him off of medication, he
15 must be suicidal again. I asked her if she looked up anything to try
16 to educate herself on that, no, that was just her logic. Colonel
17 Malone testified that the relationship got to the point where again
18 they agreed to disagree. Just like her predecessor she ignores the
19 professional advice of Colonel Malone.

20 MJ: Let me ask you something.

21 CDC[MR. COOMBS]: Yes, ma'am.

1 MJ: Mr. Coombs, unlike suicide risk the ultimate authority to
2 make a decision on POI rests with the Brig officer, not with the
3 medical professionals, is that true?

4 CDC[MR. COOMBS]: That is true, Your Honor. And I think then
5 it's important to see where--that the POI really again is under the
6 administrative segregation and it is intended to be short term. And
7 looking at Lieutenant Colonel Hilton's testimony and other people who
8 talked about how long POI was that is why I believe under the SECNAV
9 and unfortunately it's not the best drafted of instructions, but I
10 think that is why it is intended to be short-term, to give a
11 commander a period of time to where they can see, okay, this person
12 is not going to harm themselves. And it is given the commander the
13 vested authority to make that decision because, in this instance it
14 is not rising to a level of suicide where you are going to have a
15 mental health professional, but there are a lot of reasons why
16 someone might harm themselves that perhaps a mental health
17 professional would say at this point they are not a risk but there is
18 something that you might want to watch him for. And the Brig OIC
19 should have that authority. But when you exercise that authority and
20 you do it arbitrarily that's where you have a problem.

21 I could show you so--At this point she talks about, again,
22 the way PFC Manning was in January and February. And we get to the 2
23 March comment to Master Sergeant Papakie and when you hear PFC

1 Manning's version of that it's painful to think how he was talking to
2 Master Sergeant Papakie believing that he was getting through to him.
3 And all the while Master Sergeant Papakie, even though he admitted, I
4 never gave PFC Manning any indication that I was troubled by what he
5 had to say. He testified on the stand he didn't want to do that
6 because he was concerned PFC Manning might do something that very
7 moment apparently. But while they are talking and Master Sergeant
8 Papakie walks away you could just think for a moment in PFC Manning's
9 mind, you know what, I finally got through to somebody. I got
10 through to the most senior NCO in the entire Brig. He also agrees I
11 can tell, that it's just ridiculous that I'm on POI. Little does he
12 know Master Sergeant Papakie is going to Chief Barnes and telling her
13 about the comment. And they all agree that PFC Manning didn't say he
14 was going to harm himself with his underwear. They all agree that he
15 was smiling and chuckled as if it was absurd what he was saying and
16 even Captain Casamatta once he hears about it says, you know what,
17 no, he is not going to harm himself. I can--I know him well enough
18 to know that. And yet they use that to justify from that point
19 forward adding the further embarrassment of striping down and being
20 naked every night and then ultimately they give him the suicide
21 smock.

22 MJ: When did he receive the suicide smock?

23 CDC[MR. COOMBS]: 7 March, ma'am.

1 MJ: Is it the defense's position that he had it until he was--
2 he was wearing it until he was transferred to the Regional
3 Confinement Facility? I thought I heard testimony that it was only
4 there for a short period of time?

5 CDC[MR. COOMBS]: Right. No, ma'am, he had it from 7 March to
6 20 April and the only thing I can say to that is whoever told Captain
7 Casamatta that was either mistaken or purposely misleading him.

8 So then you get the removal of the underwear and here's
9 another telling moment. Colonel Malone goes to again, Chief Barnes
10 and says, look, he is not intending to harm himself when he says
11 that. That's just his way of intellectualizing the absurdity of his
12 conditions. He's trying to basically calm you by telling you, look,
13 all the while I've had the most dangerous thing probably you could
14 have given me, in my estimation. I haven't harmed myself. So
15 clearly I'm not at risk to harm myself. But Chief Barnes doesn't
16 listen to that and the underwear is taken away and that eventually
17 makes it way up to PSL and that's where Chief Galaviz and Lieutenant
18 Colonel Wright weigh in on this.

19 MJ: What is the defense's position with respect to taking away
20 clothing for a prisoner or a Brig officer's authority to take away
21 clothing from a prisoner not on suicide risk?

22 CDC[MR. COOMBS]: We don't believe the Brig officer has the
23 authority.

1 MJ: From the detainee?

2 CDC[MR. COOMBS]: Yes.

3 MJ: Okay.

4 CDC[MR. COOMBS]: Yes, Your Honor. And I base that on
5 Lieutenant Colonel Wright's email and Chief Galaviz' testimony of
6 look, if you are going to take precautions that are consistent with
7 suicide risks you have to put them in suicide risk. Otherwise then
8 you could circumvent the requirement of having the mental health
9 professional's concurrence by just adding enough special handling
10 instructions to POI that there's no functional difference between
11 suicide risk and POI. And Chief Barnes in her response to Colonel
12 Oltman when she's asked to justify her position cites the provision
13 under suicide risk. She also says, you know, well, we just agree to
14 disagree basically with PSL but on the stand she ultimately tells you
15 that yes, I was relying upon a provision that falls under suicide
16 risk. So, even she acknowledges she didn't have the authority to do
17 that.

18 Now, the next day there--there has been a lot of testimony
19 as to what happened as far as why but not what happened. The next
20 day it's clear that PFC Manning is standing naked for count. The
21 question is does he do that voluntarily to manipulate the situation
22 or is he ordered to do that. He says, you know, I got up and I had
23 the blanket and they tell me, is that how you stand, essentially.

1 And he asks for clarification. He is told the same thing and then he
2 basically then stands naked. Well two witnesses that the court
3 should look to in order to clarify this would be GM2 Webb who said
4 when I go as the DBS, if I looked over and I saw a detainee standing
5 naked, the count is stopping and I'm correcting that immediately.
6 I'm going to ask why are you standing there naked and I'm directing
7 him to get dressed. If he doesn't get dressed we are dealing with
8 that issue right then and there. I'm not walking through on my
9 count. The other thing is an absent witness. You don't have Staff
10 Sergeant Terry here. You don't have any of the guards from that time
11 period here. The government took great pains to bring everybody who
12 had anything to do with the 18 January incident in order to document
13 what they believed happened in the rec room. But yet they bring
14 nobody to document what happened on 3 March. No one. Wouldn't Staff
15 Sergeant Terry be a prime candidate to be here on the stand to
16 testify as to what happened? Or whoever was in the observation room.
17 But also what is also telling as to why they wouldn't bring anybody
18 is you don't have what you would expect to see. PFC Manning was
19 counseled for everything he did wrong and when I say everything it's
20 minor stuff and there's not many counselings. If he didn't eat
21 everything he got counseled. If he moved while they were trying to
22 put on restraints he got counseled. Chief Barnes said she thought it
23 was put on his hard card but we don't have the hard card, but

1 something like that where she says look, hey, it's basically a one-
2 time occurrence, we've told him not to do that anymore. Really? A
3 guy standing naked is a war--all that warrants is just don't do that
4 anymore. That would be an issue clearly that they would document.
5 If they didn't do something disciplinary to him it would clearly be
6 documented that he refused an order to cover himself. Somebody would
7 have come out and said cover yourself or give him the clothes and
8 said dress and he would refuse that order and then they would have
9 documented that.

10 MJ: Is there any evidence that there was such an order given?

11 CDC[MR. COOMBS]: To dress?

12 MJ: To cover himself.

13 CDC[MR. COOMBS]: No, there's no evidence and that's the
14 problem because that would be the thing you would expect to see. You
15 know, if the situation were as Chief Barnes want you to believe that
16 Manning chose to do this on his own to make some sort of statement
17 then you would expect to see an order given to him to cover himself
18 by the DBS or by somebody else and then followed up with a
19 counseling. And if you got the observation room there, that's--
20 whoever is in there clearly can see PFC Manning standing naked. The
21 lights are on. So, even before the DBS walks in there you would
22 expect that somebody from the observation room would walk out and
23 say, Manning, what are you doing? And if the clothes were in fact in

1 the feed tray then you would expect that that person, Lance Corporal
2 Whoever, would say, PFC Manning, put on your clothes. And the whole
3 count would be held up until PFC Manning did that. They were willing
4 to do a forced-cell extraction when he wasn't going to surrender his
5 clothes quickly enough. They certainly would have done something if
6 he refused to put on his clothes.

7 Now, as I said the declining communication does happen and
8 that, if you look at the weekly reports it's clear that happens after
9 25 February and the defense's position is that it happens really
10 after the underwear is taken away from PFC Manning. And he does, in
11 fact, limit his communication. Again, that in the defense's
12 estimation is the clearest proof that PFC Manning had all of his
13 mental faculties at that point because that's the sane thing to do.
14 Every time you talk you get into trouble, well, stop talking. Just
15 give them the yes or no, nothing more than that. That can't get you
16 in trouble but little does he know because nobody is telling him
17 really that that is, in fact, going now keep him in max and POI and
18 keep his underwear being taken away from him until he leaves on 20
19 April.

20 The visitation list, another example of taking something
21 that is a random thing and trying to make the most out of it to
22 justify his conditions. Chief Barnes, when her initial emails is not
23 concerned about PFC Manning harming himself, not concerned that oh,

1 PFC Manning has taken all these people off his list. What she's most
2 concerned about is one of the people that he's taken off might cause
3 media interest. And she puts that out as hey, look, you know, I
4 think basically Manning is trying to set us up. Maybe the defense is
5 in on it. They are trying to make us look bad. That's her initial
6 concern. And then the other emails that I send--that she sends that
7 I have provided to the court then back up the fact that PFC Manning
8 was required to fill out a new visitation list and a new DD Form 510
9 and he was upset about that. And she says, oh well. And then she
10 also documents that the reason why he removed people was because he
11 removed people who didn't visit but he primarily just wanted to
12 remove two people from his list. People who were talking to the
13 media and he didn't want them to talk to the media. And so he wanted
14 to remove them and he was told if he was doing that he had to update
15 his list. Not any reason than to keep him on max and POI, but again
16 this is now cited by the C and A Board as a justification for their
17 determination that he should be on max and POI.

18 Complaints. When did he complain and why didn't he
19 complain sooner? Well, again, complaints are a good piece of
20 evidence to know whether or not there is, in fact, an issue. If an
21 accused never complains until he shows up at court, there is a good
22 chance that it wasn't problematic, but PFC Manning does complain. He
23 complains as early as 10 August 2010, to his chain of command, saying

1 I don't understand why I am on POI. And his first sergeant says I'll
2 look into it. But obviously the first sergeant even says, that
3 there's not a lot I can do about it other than ask about it. I get
4 information and then I give it to you. I can't order them to change
5 you in your custody. Then he continues to complain to the command
6 over a period of time, saying I don't understand. You have a period
7 where he says, I do, and that may coincide but it's difficult because
8 Gunny Sergeant Blenis denies doing this, but it probably coincides
9 with Gunny Sergeant Blenis saying, look, it's the docs.

10 MJ: Well, PFC Manning was seeing the doctors every week. If
11 Master Sergeant Blenis was telling him it was the doctors that were
12 keeping him on POI wouldn't he have addressed it with the doctors?

13 CDC[MR. COOMBS]: Well, again, he's addressing an O6 so, and
14 he's probably more in the doctor's talking to him and then they might
15 talk about neutral things. But eventually he does address it to
16 them. And the time period that goes by he probably accepts that
17 Gunny Sergeant Blenis is telling him the truth. And then as the time
18 goes by he does address it and he asks, you know, what are you
19 recommending and he's basically told at that point that hey, we are
20 recommending that you come off of POI. And so that coincides with
21 PFC Manning then starting to complain to me, his attorney, in late
22 Fall which he is probably towards the very end of October, beginning
23 of November timeframe. And that's when I start addressing the issues

1 with MDW SJA to try to resolve that just through the informal
2 channels. I'm telling him to be patient. Months continue to go by
3 then we go into December and then January. In January is where he
4 files his DD Form 510 with Chief Averhart. It coincides with me
5 sending a memorandum to Chief Averhart requesting that he remove PFC
6 Manning from max and POI.

7 MJ: When was that done?

8 CDC[MR. COOMBS]: 5 January 2011. And then when we don't
9 receive a response from that and the emails that you received
10 indicate that Chief Averhart was not going to respond to that. Then
11 we file a 305(g) request with Colonel Coffman. And we also file our
12 first Article 138 complaint, on 19 January. We received a response
13 to that 138 complaint on 1 March and I file a second--rebuttal to
14 that raising now the underwear issue on 10 March. We receive a
15 response to that, I believe, the first week of April and then we file
16 a second rebuttal on 10 April. On 20 April PFC Manning is moved so
17 that kind of moots the issue at that point because now he is at the
18 JRCF. But then this is probably the best evidence that PFC Manning
19 did not need to be in the conditions that he was in, that they were
20 too onerous, more onerous to needed to ensure his presence at trial
21 because he winds up at the JRCF and after doing the indoctrination,
22 like everyone else, not being in max or POI at that point, just doing
23 the normal indoctrination he's placed in MDI. And from 20 April to

1 the middle of December of 2011, no issues. December of 2011 he has
2 the one altercation with another detainee, does his punishment and
3 then again no issues from that point forward. PFC Manning is allowed
4 to talk to other detainees. He's allowed to go to rec call with
5 them. He's out of his cell. He's allowed to freely move without
6 being in chains. He's allowed to have items, personal items in his
7 cell, never harms himself despite Master Sergeant Papakie's
8 prediction that if given the opportunity he would do it. He then now
9 is at JRCF with absolutely no issues and he's with a commander who
10 testified on the stand that, look, I listen to my doctors. The
11 doctors tell me he's not a risk of harm, I listen to them. I follow
12 my doctors. Have you ever overruled your doctors? No, I've never
13 overruled my doctors. Because she listens to the subject matter
14 experts. Captain Casamatta and First Sergeant Williams both
15 testified that once they go see PFC Manning at the JRCF he is
16 happier. He's more talkative. And that takes us full circle again
17 to why was he in max and POI.

18 The question is not was he treated differently than other
19 max and POIs at the JR--at Quantico. The question is why was he ever
20 in max and POI after 27 August and nobody on that stand has testified
21 with a legitimate, non-punitive basis for that. The email traffic
22 and all the emails, the 1,374 emails that we got on the, you know,
23 the 12th hour really do paint the collage of what happened here and

1 it goes back to that chart of everybody being concerned that if
2 something happened to PFC Manning who would be the one who would be
3 held responsible for that. Lieutenant General Flynn made it clear he
4 was a suicide risk. Once you hear that from an O9 we're in the
5 military, you know that no one is going to want to risk their career
6 to say, well, I didn't think he was a suicide risk and low and behold
7 he did something. The easy thing would have been to rely upon the
8 doctors and say, the doctors are telling us that he's not a suicide
9 risk. He is no longer POI. He's not a flight risk. He's not
10 violent. He's not dangerous. That would have taken him out of max.
11 He would have been in MDI and then they would have been at that point
12 relying upon people who were seeing him. Gunny Sergeant Blenis had
13 said nothing to indicate that PFC Manning was a flight risk or
14 dangerous to himself to warrant max. And said nothing to warrant
15 POI. The worst he could say about PFC Manning in the weekly reports
16 was that he wasn't the most talkative person to him.

17 MJ: Mr. Coombs, let me ask you a question. If one of the
18 justifications that the Brig personnel said for keeping PFC Manning
19 in maximum custody and POI status was protection from other inmates
20 and PFC Manning, I believe it was on the 21st of January of 2011,
21 even told the C and A Board that if he was removed from POI/max, he
22 would still request protective custody. Assuming let's say for
23 example that the Board decided to remove PFC Manning from maximum and

1 POI and place him in protective custody, what differences would be in
2 his conditions of confinement with that decision?

3 CDC[MR. COOMBS]: Okay. I would say first of all for the
4 Board what he said was, I understand if you think I am a risk I
5 understand if you put me in some sort of protective custody. So, and
6 if they in fact had something actionable to say that that would be
7 the case and that's why I asked Averhart did you hear anything, that
8 would be an appropriate thing at that point. I believe the
9 difference is in protective custody would be he would not be required
10 to have the whole facility locked down when he was moved. He would
11 not be in full restraints when he was taken out of his cell. He
12 would be at least, I would hope that for the first, from July 29th to
13 10 December he would not be restricted to 20 minutes of rec hall in
14 full restraints. He would be allowed to have personal items in his
15 cell because they would no longer be a risk of self-harm. He would
16 not have to ask for toilet paper and other hygiene items. Hopefully
17 they wouldn't have placed him right in front of the observation booth
18 so that he would have the luxury of being able to have some privacy
19 at some point. They would have, and even if they thought he was a
20 risk of harm to other people I would hope that they would still put
21 someone next to him so that he could talk to them and have
22 interaction with another detainee. And assuming that he built up a
23 relationship with that detainee perhaps they could be so kind to also

1 maybe allow that if they knew there wasn't going to be harm allow
2 that other detainee to maybe do things with him, such as go to rec
3 hall, having some other interaction with other people. When he went
4 to go visit his guests who came to see him he wouldn't be in full
5 restraints. He would still be in the no-contact booth but he aunt
6 and everyone else would not have to see him. And he would be allowed
7 to exercise in his cell.

8 MJ: So, you say he would or wouldn't be in the visitor no-
9 contact booth?

10 CDC[MR. COOMBS]: No, he would, that was the only visitation
11 booth they had, ma'am. So, his aunt wouldn't have to see him in
12 restraints and then he would be allowed to exercise in his cell.
13 Chief Averhart has said that as long as you weren't in max or POI or
14 SR you could exercise in your cell. So, even though small
15 differences would have made a big difference to his overall quality
16 of life. The being treated or viewed kind of almost as a zoo animal
17 for that period of time has to weigh heavily on somebody's psyches
18 and again the truly amazing aspect of this whole story is what the
19 government has been able to put up is all they have been able to put
20 up because you would expect to see a lot more than that.

21 Subject to your questions, ma'am.

22 MJ: I think I asked them all, thank you.

23 CDC[MR. COOMBS]: Thank you, ma'am.

1 MJ: Alright, Government, how would you like to proceed?

2 TC[MAJ FEIN]: Ma'am, could we go on a 45-minute recess for
3 lunch then we would come back and hopefully push through and finish?

4 MJ: Alright. Any objection?

5 CDC[MR. COOMBS]: No, objection, Your Honor.

6 MJ: Court is in---if we start up at a quarter of, does that
7 work?

8 TC[MAJ FEIN]: Yes, ma'am.

9 MJ: Alright. Court is in recess.

10 **[The Article 39(a) session recessed at 1205, 11 December 2012.]**

11 **[The Article 39(a) session was called to order at 1250, 11 December**
12 **2012.]**

13 MJ: This Article 39(a) session is called to order. Let the
14 record reflect that all parties present when the court last recessed
15 are again present in court.

16 Who will be arguing for the government?

17 TC[MAJ FEIN]: I will, Your Honor.

18 MJ: Major Fein?

19 TC[MAJ FEIN]: Ma'am, the law. The defense bears the burden of
20 establishing an Article 13 or R.C.M. 304 or 305 violation by the
21 preponderance of the evidence. Article 13 sets forth two general
22 prohibitions. Imposition of punishment prior to trial and conditions
23 of pretrial confinement that are more rigorous than necessary to

1 ensure the accused presences at trial, those two general
2 prohibitions. According to CAAF in *King*, 61 MJ 225 at 227, the first
3 factor, imposition of punishment prior to trial focuses on the
4 purposes or intent to punish which is determined by examining the
5 intent of the Brig officials or by examining the purposes served by
6 the restriction or condition imposed and whether such interest are
7 reasonably related to a legitimate governmental interest. According
8 to the *King* court the second factor prevents imposing unduly rigorous
9 circumstances during pretrial confinement. Conditions that may give
10 rise to a permissive inference that an accused is being punished or
11 that the conditions are so excessive as to constitute punishment
12 itself.

13 Violations of confinement regulations if any do not
14 constitute *per se* violations of Article 13. *Williams* citing *Adcock*,
15 the same *Williams* court citing *Adcock* also held that, under 305(k), a
16 service member may identify abuses and discretions by pretrial
17 confinement officials or authorities or unusually harsh circumstances
18 including violations of applicable service regulations; however,
19 those officials must make or have a knowingly and deliberately--a
20 knowing and deliberate violation of the regulations. And it's of the
21 regulations that are designed to protect the rights of the accused,
22 it's not just any violation of regulation.

1 So, ma'am, today you are left--or for this motion hearing
2 you are left to make the following three determinations. One, was
3 the intent of the confinement staff to punish Private First Class
4 Manning or otherwise stated, was there a legitimate government
5 interest in imposing the conditions. Two, were the conditions so
6 excessive as to constitute punishment in violation of Article 13 or
7 unusually harsh circumstances under R.C.M. 305(k).

8 MJ: Let me ask you a question.

9 TC[MAJ FEIN]: Yes, ma'am.

10 MJ: Do I consider excessiveness of conditions when looking at
11 whether something is reasonably related to a government objective?

12 TC[MAJ FEIN]: Under 305(k), ma'am, no.

13 MJ: Under Article 13?

14 TC[MAJ FEIN]: Yes, ma'am.

15 MJ: Okay.

16 TC[MAJ FEIN]: Ma'am, three, did the Brig officials abuse their
17 discretion by knowingly and deliberately violating provisions of the
18 service regulation and for this issue the SECNAV, or BUPER but only
19 at the time that it was published, March of 2011, that are designed
20 only those sections that are designed to protect the accused, the
21 rights of the accused, which would also be in violation of R.C.M.
22 305(k). Your Honor, defense has not alleged a co-mingling issue or

1 any other issue under R.C.M. 304 or 305 to the government's knowledge
2 so those are the three major issues.

3 Your Honor, the United States argues that one, the United
4 States Marine Corps Quantico Staff had only one interest, or intent,
5 excuse me, to protect Private First Class Manning from harming
6 himself and others while ensuring he was present for any future trial
7 or any other related legal proceeding, such as the R.C.M. 706, a
8 preliminary classification review, etcetera and it was not to punish.

9 Two, Your Honor, the conditions were not so excessive to
10 constitute punishment or unusually harsh circumstances considering
11 the accused's potential length of sentence of over 50 years for the
12 original charge sheet and life without the eligibility of parole for
13 the--what the time, Your Honor, it could have been a capital referral
14 but at least life without eligibility of parole, poor tolerance of
15 frustration, disruptive behavior, poor home and family conditions,
16 national security and risk of self-harm.

17 MJ: Well, let's look at--you have disruptive behavior, at what
18 point did that start?

19 TC[MAJ FEIN]: Well, ma'am, at first, the first documentation of
20 disruptive behavior started in Kuwait and the documentation that
21 Quantico received coming forward. That was the first time seeing
22 disruptive behavior.

23 MJ: Okay. And once he arrived at Quantico----

1 TC[MAJ FEIN]: Yes, ma'am.

2 MJ: ----when were the first observations of disruptive
3 behavior?

4 TC[MAJ FEIN]: Ma'am, that would have been in January, the
5 January incident.

6 MJ: Okay.

7 TC[MAJ FEIN]: Ma'am, the third question, but for the two times
8 of being kept on suicide risk after the mental health providers
9 recommended removal the Brig officials did not abuse their discretion
10 by acting knowingly and deliberately in violations of the SECNAV or
11 BUPER, for provisions assigned to protect Private First Class
12 Manning's rights. Now, specifically on what I--on that third--that
13 third issue, Your Honor, before moving forward based on *Williams*
14 there's multiple *Williams* pretrial confinement cases so this is 68 MJ
15 252. PFC Manning should receive no more than 7 days credit. That's
16 1-for 1 for each day he remained on suicide risk after the mental
17 health providers recommended removal and that is--that is 1-for-1
18 credit both under Article 13 and R.C.M. 305(k).

19 MJ: Are you talking, well, are you saying 1-for-1 credit under
20 Article 13 and 1-for-1 credit under----

21 TC[MAJ FEIN]: No, ma'am.

22 MJ: Okay.

1 TC[MAJ FEIN]: The 1-for-1 credit under *Williams* and what the
2 *Williams* court held would be sufficient for both at the same time, so
3 concurrent 1-for-1 credit. The *Williams* court held suicide watch is
4 designed to protect the personal liberties and interest of
5 individuals, although they--although that case itself, Your Honor,
6 the government does--would argue is not directly analogous to the
7 facts in this case but it is the closest in fact pattern, which is
8 why the government is saying credit is due.

9 MJ: Do you--Would the government carry that farther and say the
10 prevention of injury regulations are for the benefit of the accused?

11 TC[MAJ FEIN]: Your Honor, not necessarily to the level of a
12 right such as what *Williams* court held for suicide risk and watch.
13 Suicide risk watch is the most intrusive set of standards. Having
14 someone one-to-one, 24 hours a day watching an individual either
15 through camera or having someone sit in front of the cell and it did
16 not rise to that. What's clear in the regulations both the Air Force
17 Regulations and *Williams* the Navy Regulations that we are focusing on
18 in this case is that suicide risk is a very specific category. It
19 has a very specific definition and the requirements and at the end of
20 the day, Your Honor, it is that one-for-one watch, which is what
21 every witness who talked about suicide risk testified about.

22 MJ: What is the government's position with respect to taking
23 away clothing? The SECNAV Instruction says that a Brig official can

1 do that under suicide risk. What's the government's position whether
2 the Brig officials can do it on POI or any other status?

3 TC[MAJ FEIN]: Yes, ma'am. First off the United States argues
4 that it is within the, I guess inherent right of a Brig CO to remove
5 clothing. It goes to--as a legitimate penalological interest. That is
6 memorialized within the SECNAV. First, Your Honor, Paragraph 5,
7 unfortunately these paragraph numbers, it's Paragraph 5, 5101, sub 3.

8 MJ: Hold on.

9 TC[MAJ FEIN]: Yes, ma'am.

10 MJ: 5101 sub 3?

11 TC[MAJ FEIN]: 5101 sub 3. Ma'am, Page 5-2.

12 MJ: Page 5-2, let me find the regulation first, hold on. The
13 portion dealing with administrative segregation?

14 TC[MAJ FEIN]: No, ma'am. This is definitions so--Paragraph 3
15 is definitions, A is administrative segregation, B is--go down to
16 Delta, Your Honor.

17 MJ: I'm looking at D.

18 TC[MAJ FEIN]: Where it talks about the legitimate penalological
19 interest.

20 MJ: All right.

21 TC[MAJ FEIN]: And the regulation also outlines that it is
22 within the essentially inherent right of a Brig CO for safety and
23 security concerns and other citation there, Your Honor, is under the

1 same--the same portion but it's under 3(i). So, when you look at the
2 rights section, there again it talks about the legitimate penalogical
3 interest for security and safety. So, it does have to have a
4 legitimate government basis that relates back to security and safety
5 otherwise it would not be authorized.

6 MJ: If that's correct then why is clothing separately mentioned
7 in the suicide risk section?

8 TC[MAJ FEIN]: Yes, ma'am, because it goes back to when there--
9 from the testimony that you've heard both from--from Chief Warrant
10 Officer Galaviz and Chief Barnes is that when the Brig CO has to make
11 a decision on the best way to provide that security and safety for a
12 detainee, they have to make that decision of how to either escalate
13 the removal or escalate restrictions, take clothing whatever that is.
14 So, for suicide risk once the term suicide risk is ordered that
15 inherently comes from the regulation and through practice a series of
16 different, I guess you would say tasks. One is to take all the
17 clothing, provide blankets, another one is to have someone on watch
18 24 hours a day. So what the reg does essentially does define that,
19 when suicide risk is ordered this is kind of what the minimum of what
20 is expected, not required to happen. But the reg is also silent on
21 whether clothing could be taken for other reasons. I mean, it does
22 talk for instance during in-processing a full-body search, scars and

1 tattoos, that type of activity but again it goes back to the interest
2 of security and safety.

3 MJ: If that's true then why is the proponent of the regulation
4 sending emails to Chief Barnes that if she is taking measures that
5 approach suicide risk without going on suicide risk that's not how we
6 do business?

7 TC[MAJ FEIN]: Yes, ma'am, it goes to the Brig CO's discretion
8 from Chief Galaviz's own testimony he had not necessarily seen where
9 a Brig CO had ordered someone's clothing removed but what was the
10 alternative and that's really what the United States argues what is
11 the focus is what Chief Barnes said. I mean what she had in front of
12 her was a statement made about underwear that could be used. It
13 wasn't going to be taken lightly, jokingly or not, so the only option
14 she had was to remove the underwear or order him on suicide risk
15 which is the most intrusive level of status which the courts have
16 upheld over and over again, the rights that are given to the accused
17 through multiple service regulations. So, as Chief Barnes testified
18 she was forced with that decision. Do I tailor a specific remedy for
19 a specific statement or issue or do I just default to a regulation
20 and order suicide risk and have everything else that comes with that
21 meaning 24-hour watch, and--and, well, really that would be the
22 remainder of it and having the underwear removed 24-hours a day?
23 Well, what she did is, she said because there are not as many

1 visitors, excuse me staff individuals and visitors coming through at
2 night time, it is only the guards that are watching at night she
3 thought to minimize or mitigate that risk she would order the
4 underwear removed at night and not order suicide risk.

5 MJ: So when PFC Manning was on POI what was he wearing at
6 night?

7 TC[MAJ FEIN]: Ma'am, when he was on POI he was still authorized
8 to wear--to wear his sweats or other clothing. No, excuse me, Your
9 Honor, he--clothing was taken but not the underwear and socks and he
10 had his two POI blankets.

11 MJ: What about the glasses?

12 TC[MAJ FEIN]: Uhm, ma'am, I would have to look again but I
13 think at times the glasses were taken and were not taken depending on
14 which CO and at which time.

15 MJ: On POI?

16 TC[MAJ FEIN]: Yes, ma'am.

17 MJ: Okay. Let me just go down that road with you a bit. How
18 much leeway do Brig officials have according to the government to do,
19 I guess, like a suicide light if you will, everything on suicide risk
20 with instead of watching, have a one-on-one in the cell they are
21 watched every 2 minutes. I mean is there some line there?

22 TC[MAJ FEIN]: Ma'am, the United States will argue that there
23 should be no--no, there is no line and there should be no line.

1 MJ: Why?

2 TC[MAJ FEIN]: Because it really goes back to the testimony
3 that--that the court has heard throughout this entire proceeding and
4 that is that every individual detainee has his own or her own unique
5 circumstances and every provision put in place has to be tailored to
6 that individual. There are absolute checks in the system and that's
7 why we are here today. And there's other checks in the system as
8 well for that but it has to be tailored and I think the best example
9 actually is when Chief Barnes ordered the underwear to be removed
10 only at nighttime and it was very tailored in that regard. So, 5
11 minutes, 2 minutes, it is. Now I would agree that there's probably a
12 point where it is every 30 seconds, it's essentially 24-hours a day
13 but the 5 minutes you even heard testimony that it meant that--that
14 does not mean that someone's there all the time watching Private
15 First Class Manning or any other individual that would be on a 5-
16 minute watch. It's not a lot. The government is not contending it's
17 not the same as not having someone walk by every 15 minutes but in a
18 5 minutes, that's 5 minutes of potential privacy an individual gets
19 where otherwise they wouldn't have it.

20 MJ: All right.

21 TC[MAJ FEIN]: Your Honor, again, just to distinguish--go back
22 to *Williams* briefly I think this also could help eliminate just in
23 *Williams* the Air Force Regulation required daily reviews by suicide

1 watch status detainees and required the mental health providers to
2 make similar recommendations for removal. *Williams* was not seen
3 regularly by mental health providers after he was ordered into
4 suicide watch. The trial court did order Article 13 credit but when
5 CAAF was reviewing it they were reviewing it under 305(k) and Article
6 13. They ultimately held that the 86 days from the start of the
7 suicide watch until--until he was removed was a violation of 305(k)
8 because that interest involved if you are put on suicide watch you
9 have to have a medical [sic] health provider visit you that was in
10 the interest of the detainee's rights and that was something that the
11 confinement facility knew and they did not affect it. So, for
12 timing, again 7 days credit, Your Honor, that would be from 6 August
13 2010 until 11 August 2010, this is outlined in the government's
14 response, and then the second incident 18 January 2011 until 20
15 January 2011. So, going----

16 MJ: So, you are including 18 January the date itself?

17 TC[MAJ FEIN]: No, Your Honor.

18 MJ: So, the 19th and the 20th?

19 TC[MAJ FEIN]: Yes, ma'am.

20 MJ: Okay.

21 TC[MAJ FEIN]: So, ma'am, as far as a road map forward for this
22 oral argument I intend to first brief max custody and then talk about
23 POI status and then talk about communications between Private First

1 Class Manning and the staff and then talk about the Brig official's
2 decisions at the time and how that--how the court should view that
3 under the law and then a brief conclusion.

4 First, Your Honor, max custody status. Maximum custody is
5 not unduly rigorous as outlined in numerous cases cited by the
6 prosecution and the defense in briefs. Under the SECNAV Instruction
7 max custody is appropriate for prisoners requiring special,
8 custodial, supervision. Prisoners--A quote from the actual
9 regulation, Paragraph 4201.2.a, it's Page 4-7, but the definition is,
10 "Prisoners requiring special custodial supervision because of the
11 high probability of escape are potential or--excuse me, are
12 potentially dangerous or violent and whose escape would cause concern
13 of a threat to life, property, or national security." To highlight
14 here one issue in defense's argument and especially with their--what
15 the defense was trying to elicit from witnesses and really couldn't
16 is this idea of escape. The, I would say lay person, one who does
17 not work in a Brig, and this is from testimony, would think of escape
18 as someone who has committed an overt act or taken preparatory steps
19 not use a reference to a movie about prison escapes, but to have a--
20 to have a hammer to have a chisel or to scope the fence line when you
21 are walking around or literally to flee when given the opportunity.
22 Yes, those are clear-cut overt acts but what was elicited from
23 testimony from the warrant officers is that the confinement--the

1 potential sentence is a very huge factor if not the greatest factor
2 for confinement Brig OICs and decision makers on determining whether
3 escape is a potential. There is a greater a sentence more potential
4 an individual will do to try to avoid having that sentence.

5 MJ: What's the government's position then on the long litany of
6 case law that says maximum--the potential maximum punishment alone
7 isn't--can't suffice for maximum custody?

8 TC[MAJ FEIN]: Well, ma'am, the government's position is, is----

9 MJ: Is it----

10 TC[MAJ FEIN]: With all due respect, Your Honor----

11 MJ: ----are those cases involved in----

12 TC[MAJ FEIN]: ----it's exactly what you just said. When that
13 alone is the only reason there is no evidence that's been elicited
14 from any member of the staff that that is the only factor that was
15 considered. Every one consistently said that was a factor but there
16 as a litany of factors that every single witness rattled off, Your
17 Honor, and the C and A Board's considered each week. The major
18 factors, potential length of sentence was one, poor tolerance for
19 frustration, disruptive behavior, poor home and family conditions,
20 national security risks, risk to self-harm. I--There is no evidence
21 that that is the only factor. But it was a factor and it's one of
22 the major factors for risk of escape. So, it's not necessarily an
23 overt act or a statement of someone although that would be clear.

1 MJ: Does that or is there a requirement to consider that factor
2 over time?

3 TC[MAJ FEIN]: No, Your Honor. The United States would contend
4 that it doesn't. The charges unfortunately don't change and I can
5 find the case for you. I don't have it with me right now which case
6 references this, but I know what was previously litigated was there
7 could be an argument that the prosecution, the government, the
8 command's charging decision would somehow then dictate this because
9 that's how the charges get on a charge sheet, they get sworn out, and
10 then suddenly these conditions go into effect. But it doesn't change
11 over time, Your Honor. If it does change, Your Honor, it actually
12 changes to the contrary. The closer you get to trial with the
13 realization, I think Chief Galaviz talked about this, the closer you
14 get to trial the realization that these--that this potential sentence
15 could actually occur increases an escape risk through history.
16 Again, not requiring an overt act.

17 Your Honor, may I have a moment?

18 MJ: Yes, please.

19 [There was a brief pause while trial counsel reviewed notes at
20 counsel table.]

21 TC[MAJ FEIN]: I will keep going on, Your Honor.

22 MJ: Just, is there any under your argument there that the
23 potential sentence is a huge factor, are there ever situations where

1 the mitigating factors or the factors opting for MDI can overcome the
2 potential sentence?

3 TC[MAJ FEIN]: Your Honor, I think absolutely. That's within--I
4 think--I know the testimony that the court has heard goes directly to
5 that. All the factors are weighted including recommendations from
6 psychiatrists, personal observations, et cetera so all that is
7 weighted. So, what I would say is we should factor I'm only talking
8 about the escape portion and that's all of it. Not the overall max
9 custody status because escape is one reason to hold someone in max
10 and we'll talk POI in a moment, but it is one of many factors and I
11 think it is--it is easy for attorneys to sit here today in front of a
12 court and say I think it is a balancing test but it's clear that's
13 what--that's what a C and A Board does and ultimately the Brig's CO
14 make the decisions. It's a balancing test and they have to consider
15 all these factors and figure out which ones they need to weight more
16 and what we've heard here and we'll talk about in a little bit more
17 is communications one of the greatest factors to really understand.
18 And that applies to risk of escape, risk of self-harm, communications
19 how they figure out how to truly assess this individual not based off
20 of paperwork, not based off third-party input although those are
21 factors but really to understand what this individual is thinking at
22 this time.

23 MJ: Okay.

1 TC[MAJ FEIN]: Your Honor, where we left off talking about just
2 clarifying for the court that escape is not just some overt act. We
3 are talking about max custody in the regulation. Following in the
4 regulation on Page 4-10 a decision to assign a detainee to max
5 custody may, may be based on the, and then it's the list of factors
6 from the actual Secretary of the Navy Regulation, assaultive
7 behavior, disruptive behavior, serious military criminal record
8 convicted or alleged, low tolerance for frustration, poor home
9 conditions or family relationships, a mental evaluation indicating
10 serious neurosis or psychosis, and a potential length of sentence.
11 But the key there, Your Honor, is the following sentence in the
12 regulation. Even the regulation highlights for Brig COs and all Brig
13 staff that it must be understood the factors mentioned above are only
14 indicators, not iron-clad rules and that's what gives the Brig COs
15 this discretion for each detainee. But again, it must be tailored
16 for each detainee and it must be based off the circumstance presented
17 to the Brig COs at the time they are making the decision. We'll get
18 to that in a moment, Your Honor.

19 So, based off those requirements under the SECNAV
20 Instruction, Your Honor, the original DBS starting the night Private
21 First Class Manning in-processed, the different C and A Boards, both
22 Brig COs from the evidence that has been presented to the court
23 consider those factors.

1 MJ: Let me ask you a question.

2 TC[MAJ FEIN]: Yes, ma'am.

3 MJ: How does the Brig policy that was in effect at the time
4 saying if you are POI you are automatically max play into this?

5 TC[MAJ FEIN]: If I may, ma'am, may I answer that when talking
6 about POI or now?

7 MJ: Yes, that's fine. Go along with your argument.

8 TC[MAJ FEIN]: I'm sorry. Yes, ma'am. But briefly, ma'am, it
9 plays into it, ma'am, because of the practical application for Brig
10 Soldier for DBSs who would be junior or excuse me mid-range NCOs who
11 have to make these decisions at night it's going to be a practical
12 fact of what they are considering at the time but it has to be a--
13 United States would argue although this is not in the rules, it
14 should still be an independent assessment and in a moment we will
15 discuss, I think the witnesses all testified was. So the original
16 DBS who made the original determination, this C and A Boards every
17 week after that, both Brig COs considered the factors listed from the
18 reg, and others, personal observations, etcetera, and that's evidence
19 by. So now evidence, Your Honor, what's before the court. The
20 Kuwait transfer documents, they testified they reviewed, original and
21 additional or now the current Charge Sheet, indoctrination paperwork
22 that Private First Class Manning signed in his own handwriting, the
23 Brig forms 4200.1, the CORMIS entry showing counselor notes and the

1 summaries the C and A Boards that the 4200.1 was not there for,
2 special handling instructions, weekly progress reports that show the
3 Brig staff leaders knew about the boards, they were done after the
4 fact but at least recounted what had occurred the previous week, DD
5 Form 510s, CHITs, recommendations from mental health providers, even
6 Chief Warrant Officer 5 Galaviz's memo stating that Chief Averhart
7 should have made a different decision and specifically say--in the
8 interpretation of the word shall and plus, Your Honor, the other
9 evidence for you and at the time before the Brig COs would be the
10 testimony of Sergeant Jordan, Gunny Fuller, Master Sergeant Blenis,
11 Master Sergeant Papakie, Chief Barnes, Chief Averhart, and Chief
12 Galaviz. All about how these factors were considered or explaining
13 the rules. And then finally, Your Honor, you have before you
14 responses to the Article 138 complaints, again where Chief Averhart
15 gave an explanation and Chief Barnes.

16 MJ: What's the government's position with respect to the
17 defense argument that if communication was so important why isn't it
18 in the Article 138 response?

19 TC[MAJ FEIN]: Ma'am, that's a great question because actually
20 the United States doesn't have an answer to that. We didn't ask the
21 witnesses. But the question could be asked to the defense, why
22 didn't they allege the same thing. Why didn't they allege the same
23 thing? Why didn't they allege, for instance that Gunny Blenis at the

1 time was--was lying about--about the Brig or the doctors not telling
2 him or the doctors recommending him for POI. I mean, it's
3 unfortunate that we only have this paperwork for a snapshot of time
4 but the driving factors of what the defense was alleging at the time
5 and the response back was based off of what was alleged. So, Chief
6 Averhart had exactly what was put out by the defense in the 138
7 complaint and had to respond to it. And that response was tailored
8 to what was alleged, communication wasn't used. United States
9 doesn't know why they didn't mention communication but that seems to
10 be the key factor from every single Brig staff, even the training of
11 the junior guards from Tankersly and Cline who testified from there.
12 But it goes back to the 138 complaint is a very useful tool just to
13 glance at, a snapshot of time of what was occurring and what was
14 captured. But I go back to what also wasn't was any unprofessional
15 conduct of the Brig officials and all the way up to, apparently in
16 December 2010 Gunny Blenis not telling at that point in time Private
17 Manning that Captain Hocter was recommending him to be removed. That
18 wasn't there either. So, it's an odd usage of the 138. It captures
19 what occurred at the time and what was important at the time.

20 Your Honor, now I would like to focus your attention to POI
21 status. A question from before, specifically under the SECNAV Reg 4-
22 14, is the first time POI is referenced and that's where it defines
23 special quarters and talks about special quarters are appropriate for

1 detainees who are required for prevention of injury to themselves or
2 others. Further, under administrative segregation on Page 5-2,
3 administrative ADSEG, is defined as involuntary or voluntary
4 separation for specific cause of select prisoners from the general
5 prisoner population, authorized movement of a prisoner to special
6 quarters and their absence and for the purposes of control,
7 preserving order, prevention of injury to themselves or others. So
8 that is where the prevention of injury is at least memorialized in
9 the SECNAV Reg. The SECNAV Reg vests the authority in the Brig COs
10 to place detainees in administrative segregation or special quarters.
11 The Brig COs through their own SOP established the different
12 categories that a detainee may be placed in while housed in special
13 quarters.

14 MJ: What is the difference between administrative segregation
15 and special quarters?

16 TC[MAJ FEIN]: Ma'am, special quarters is the location. It is
17 the housing berthing area of where one is housed. Administrative
18 segregation is a status.

19 MJ: So could one be in administrative segregation while on MDI
20 custody?

21 TC[MAJ FEIN]: Yes, ma'am. Actually, ma'am, may I have a
22 moment?

23 MJ: Yes.

1 TC[MAJ FEIN]: I'm looking at the reg on that. Yes, ma'am. So,
2 ma'am, the Brig COs through their SOP establish within the rules of
3 the SECNAV and then of course later marks the BUPER but the SOP that
4 was operating at the time was just the SECNAV. They establish
5 different categories that a detainee may be placed in while housed in
6 while housed in special quarters. The SOP that was in operation at
7 the time states and the testimony you heard from the different Brig
8 staff show that through practice once the C and A Board met, they
9 made a recommendation on custody classification and category of
10 assignment in special quarters.

11 MJ: So, I guess I'll ask my question again.

12 TC[MAJ FEIN]: Yes, ma'am.

13 MJ: What does Paragraph E, Prevention of Injury, those
14 prisoners who have an indication that they intent or are
15 contemplating harming themselves or others will be assigned maximum
16 custody.

17 TC[MAJ FEIN]: Yes, ma'am, both OICs testified that there was a
18 basis for max custody of PFC--based off of PFC Manning's individual
19 factors and they also testified that POI as well. United States
20 contention is the reason that was first off none of the Brig
21 officials could understand why historically that provision was in
22 there but after talking to them, the United States contention is, is
23 that in practice once someone is in POI at the Quantico Brig and

1 those conditions of pretrial confinement, not even a Level 1
2 facility, that in--in--in I guess practice or application you are
3 essentially in max custody. You are going to be in SQL, Special
4 Quarters 1, and you are going to be in maximum custody. But the key,
5 Your Honor----

6 MJ: Well, let me just ask a question there.

7 TC[MAJ FEIN]: Yes, ma'am.

8 MJ: So the Brig officials said once you are in POI you are
9 essentially in maximum custody. What is the relationship, I mean I
10 understand you are in POI, you are going to be--well everybody was in
11 special quarters at Quantico.

12 TC[MAJ FEIN]: Yes, ma'am.

13 MJ: You are going to be moved closer to the guard house.

14 TC[MAJ FEIN]: Yes, ma'am.

15 MJ: And for constant observation. But maximum custody also
16 carries with it the lock-down requirements and the movement in hand
17 and leg and belt restraints. That's--Why would somebody in POI have
18 to have those requirements?

19 TC[MAJ FEIN]: Ma'am, I think what is clear is from especially
20 the memorandum that came from Chief Galaviz to correct it after the
21 fact although it was a source of contention that at least required
22 Headquarters, Marine Corps to push out guidance is that it was
23 thought that the two should be related. But, Your Honor, just to

1 correct, when you first started a question, the testimony that was
2 presented to the court was that there was independent determinations
3 made on the custody classification and the category of status
4 category. So they--The factors overlap there is no question about
5 that. The factors are essentially the same factors, they come from
6 the SECNAV, the SECNAV is silent on prevention of injury but they
7 reviewed both and made the determination. But both Brig COs did not
8 ever determine or make a decision that POI should be MDI. It wasn't
9 in practice either. I mean the United States contend that it could
10 have occurred but it wasn't what the practice was and it's clear in
11 the SOP the way it is written that that wasn't practiced either.

12 MJ: So, if I understand the government's position correctly
13 although there was a presumption that detainees on prevention of
14 injury status would be maximum custody. There was an independent C
15 and A Board weekly that reviewed that maximum custody status without
16 that presumption?

17 TC[MAJ FEIN]: Yes, ma'am, from the evidence that's been
18 presented to the court, yes, they made the determination separately
19 even though it is on the same form, understanding that and even
20 though the classification--even though the documents, the special
21 handling instructions even say on the top of them, prevention of
22 injury, suicide risk, and then custody level max. So even the same
23 document has both on it, it was determined on both. I mean even the

1 form you have to write in two special areas it was two separate
2 determinations after the same time and based off of independent
3 factors, although the factors were very similar.

4 MJ: All right. Proceed.

5 TC[MAJ FEIN]: So, ma'am, the C and A Board was required to
6 review the same factors for custody classification when determining
7 which special quarters category to assign PFC Manning in which they
8 recommended POI and the Brig COs said the POI--ordered POI status and
9 the--those categories, again not to go through them, but the SECNAV
10 categories they reviewed. The C and A Boards and both Brig COs
11 considered those factors and others and that's evidence by the same
12 evidence already presented, Your Honor, from all the documentation to
13 the testimony, CORMIS entries, all the way up to----

14 MJ: Let me ask you a question on that.

15 TC[MAJ FEIN]: Yes, ma'am.

16 MJ: What is the--What if any required documentation is there
17 for C and A Board?

18 TC[MAJ FEIN]: Yes, ma'am, the results of the Board must be
19 captured, and let me get the exact language from my table, Your
20 Honor. Your Honor, as I look for the exact----

21 MJ: Why don't we do this.

22 TC[MAJ FEIN]: Yes, ma'am.

1 MJ: Why don't we have you continue on with your argument and
2 your colleagues look and find the----

3 TC[MAJ FEIN]: Yes, ma'am.

4 MJ: ----regulatory paragraph.

5 TC[MAJ FEIN]: Ma'am, once we get the answer the key on that is,
6 is that from the testimony you heard and we'll get the actual
7 regulation is that the result of the initial boards were documented
8 on the Brig Forms 4200s. Any changes to the overall status were
9 documented originally before Chief Barnes showed up under Chief
10 Averhart. So changes, otherwise the form was not used which is
11 consistent with the forms that were present. However, in the CORMIS
12 entries the results of the boards and any other details from the
13 boards were captured, why I think from what Master Sergeant Papakie
14 said or Chief--or Master Sergeant Blenis for all-time in CORMIS were
15 captured.

16 MJ: Is that the CORMIS record, is that, the CORMIS records that
17 you are referring to the counseling notes from the----

18 TC[MAJ FEIN]: Yes, ma'am.

19 MJ: ----Gunny Sergeant Blenis?

20 TC[MAJ FEIN]: Yes, ma'am. So, what Gunny Sergeant Blenis would
21 do in his counselor notes is, he would essentially--he would put--he
22 would summarize the Board findings and what the Board considered in
23 those notes.

1 MJ: So there is no separate CORMIS entries for the boards
2 themselves?

3 TC[MAJ FEIN]: No, Your Honor. No, Your Honor, and the United
4 States----

5 MJ: Should there be? I mean is there any requirement that
6 there be?

7 TC[MAJ FEIN]: The understanding from the testimony, Your Honor,
8 is that CORMIS has an option to put notes in by typing, evidence by
9 the Word document printed out as a draft that is later copied and
10 pasted into CORMIS, and it also has the ability to upload formal
11 documentation. So, I think from the testimony, or I know from the
12 testimony it was explained to the court that now they are moving to
13 an all digital system so once you have a document, you scan it and
14 upload it to CORMIS. So, what I would expect to see in the future
15 but it has not happened in this case, is once the Board signs off on
16 a Brig Form 4200 that would then be uploaded but at the time it was
17 not a requirement. It didn't fill out the form when there wasn't a
18 change to classification or recommendation, but they did at least--
19 the counselor did at least type in the results of the Board.

20 MJ: What is the government's position with respect to the
21 testimony by CW5 Galaviz that there was an irregularity in the Board
22 procedures with the counselor being on the Board?

1 TC[MAJ FEIN]: A few points on that, Your Honor. Unfortunately-
2 -Well first and foremost Chief Galaviz was not at the Brig at the
3 time was not necessarily sitting where you had all the Brig staff
4 knowing the full complement of how many 22 staff members at the Brig
5 or the other composition. Second, there is no prohibition from it,
6 from having the actual counselor on the--on the Board itself. When
7 you read the SECNAV, Your Honor, when it explains and we'll have this
8 too once the provision is found, the C and A Board is required to
9 have the programs supervisor and the counselor or a counselor create
10 a document and program supervisor. I think what happened in this
11 case is because the decision was made up front to give the most
12 senior counselor, the most experienced counsel aside from Private
13 First Class Manning, you heard from testimony then Gunny Blenis had
14 no other patient--had no other detainees, had no other confines that
15 he was a counselor for. He was the NCOIC of the section. So,
16 because he was, he was put in the position of--of also being the
17 programs chief and the counselor. So, yes, he either directed the
18 documentation to be created or he created it himself. But still,
19 there is no evidence, Your Honor, of any type of other than
20 hypothetical, any type of influence by Master Sergeant Blenis or even
21 Gunny Fuller when he was the senior official. We had an Army NCO who
22 wasn't even--wasn't--who reports back to Fort Leavenworth or Army
23 Corrections Command, who even answered he was not influenced. He

1 took his job seriously. When asked by the defense, could it possibly
2 be construed as being viewed this way, the answer from everyone was
3 absolutely or yes to that effect. Because when asked that question,
4 sure, but every one testified that it did not happen, that there was
5 any influence. And at most, Your Honor, if there was any influence
6 it would be the--the--the--Private First Class Manning's counselor
7 being the one influencing. So, if anyone were to know more about
8 Private First Class Manning and any interactions they have with him
9 it would be Master Sergeant Blenis doing that.

10 Your Honor, assuming this is the exact provision we are
11 looking for, Paragraph 6303.2, this is----

12 MJ: What page is that on?

13 TC[MAJ FEIN]: Page 6-6.

14 MJ: 6303.2?

15 TC[MAJ FEIN]: 6303.2.

16 MJ: And I'm sorry, you said what page?

17 TC[MAJ FEIN]: 6-6, Your Honor, of the SECNAV Instruction.

18 MJ: Okay, give me a minute. All right.

19 TC[MAJ FEIN]: So, the middle of the page, Your Honor, Paragraph
20 2, the middle of the paragraph, it starts with, "Prisoners may appear
21 before the board to discuss their program or changes thereto if
22 considered necessary. Board's recommendation shall be recorded and
23 signed by the OIC, Brig O, or CPOIC as the approving officers." And

1 then, "when circumstances indicate a necessity for immediate action
2 may make changes", I guess, "without the board." So, the minimum
3 requirements, Your Honor, are that they be recorded and in some form
4 signed by the leader making the ultimate decision. And, although
5 Chief Galaviz did testify, Your Honor, that to the best of his
6 recollection there was a DoD Form to capture the Brig's vote. That
7 is not the case, I think he's, unfortunately has been doing policy
8 for a while.

9 MJ: Well, just so the parties are on notice and the court has
10 looked at the DoD Instructions in this and has not found a DD 2711
11 for C and A Boards under the--under the DoD Instruction if I'm
12 incorrect, you all can do an independent review and show me that form
13 I'm happy to look at it.

14 TC[MAJ FEIN]: Yes, ma'am. So, ma'am, now to transition to
15 communication. Communication between the Brig staff and Private
16 First Class Manning, now you heard testimony----

17 MJ: Now, before you----

18 TC[MAJ FEIN]: Yes, ma'am.

19 MJ: Before you get there, what is the government's position
20 with respect to the lack of communication, I guess is the best way to
21 put it, between Doctor Hocter and the C and A Board, during Doctor
22 Hocter's tenure?

1 TC[MAJ FEIN]: Yes, ma'am. Ma'am, what's clear from the
2 evidence both from Doctor Hocter's testimony and the Brig staff is
3 the communication at the Brig was not ideal between Doctor Hocter and
4 the Brig staff. Doctor Hocter did perform the minimum amount of his
5 duty of filling out a form and putting, sometimes five words on it,
6 all the way to I think two iterations full paragraphs. I think--What
7 the testimony shows, Your Honor, is, is that Doctor Hocter, first off
8 Private First Class Manning never went without mental health care and
9 when Doctor Hocter showed up and met with Private First Class
10 Manning, he did testify that he met with Brig officials but not
11 necessarily which ones, the senior Brig officials don't necessarily
12 remember meeting with him. In fact they testified that they always
13 tried to find him and they couldn't. I think the important part
14 there, Your Honor, is that there was definitely a communication
15 break-down but the information was still being relayed. The ultimate
16 recommendations to the Brig officer, to the C and A Boards and from
17 the testimony they still considered it, and they made their decisions
18 based off those recommendations. Now, yes, the Brig staff did want
19 more information than just the one line or the box checked and they
20 attempted to get that information and for whatever reason there was a
21 disconnect. But the recommendation was given and the testimony shows
22 that the recommendation was received, was reviewed, and taken into
23 consideration along with all the other factors.

1 MJ: Is it the government's position that the POI status,
2 prevention of injury status, that the Brig officials, the C and A
3 Board, and Chief Averhart were considering at the time, was that at
4 least in whole or in part because of what these officials believed to
5 have been a mental health condition of PFC Manning?

6 TC[MAJ FEIN]: Could you restate the question?

7 MJ: Was the prevention of injury status that was recommended
8 from August until I guess until January 18th, in whole or in part a
9 result or--a result of the Brig officials belief that PFC Manning was
10 suffering from mental health conditions requiring POI status?

11 TC[MAJ FEIN]: Ma'am, I think--well from the testimony, Your
12 Honor, the United States believes that that was a large factor but it
13 was one of many factors for POI, same as max custody. The testimony
14 that you heard was they considered event the potential length of
15 sentence, poor tolerance of frustration, poor home and family
16 conditions, including risk to self-harm. I mean, there is no
17 question from the testimony that, you know, Private First Class
18 Manning's original statement and their own--in the Brig's in-
19 processing documents on Page 5 of 5 where it says, "Have you ever
20 been hospitalized in a mental institution? No. Have you ever
21 considered suicide? Yes." And in his own handwriting he writes,
22 "Always planning never acting." And even if he was ordered to write
23 something because it does say, "Yes, explain", and there was an

1 expectation, anything could have been written. But when you write,
2 "always planning, never acting" and also when you are in Kuwait
3 writing, I think it was words to the effect of considering it,
4 haven't done it yet, words to that effect. So, you have done it
5 twice. The Brig knows that. That is a serious concern of theirs,
6 Your Honor. That is considered for POI but not the only
7 consideration for POI.

8 MJ: Does that kind of concern from the Brig officials ever have
9 a, I mean, at some point is there ever a length of time that goes by
10 with no additional, with good conduct and nothing demonstrated by a
11 person where that determination becomes an abuse of discretion in the
12 government's view? When you have psychiatric officials saying there
13 is no mental health condition in justifying it?

14 TC[MAJ FEIN]: I will answer this very specifically and provide
15 an explanation. With the way the court just asked the question, yes,
16 Your Honor. If there is nothing else and all you have is good
17 behavior and you have someone who is acting like every other
18 detainee, and you have a mental health provider who's making these
19 recommendation and no other factors, then yes, Your Honor, there
20 probably is some point to where a decision should be made. Maybe
21 either that they abused their discretion or at least, at a minimum
22 that at some point they should have sought another avenue or reached
23 out to get a different type of consult or done something different.

1 But those aren't the facts before the court. The facts before the
2 court is there is a pattern, I'll get to this in a little bit, Your
3 Honor, but for Private First Class Manning, there is a pattern of
4 behavior and it's not just misbehavior, but there is a pattern that
5 started before he ever got to Kuwait, once at Kuwait and the Brig
6 officials only knew what they had in front of them which is someone
7 who is not like others. They knew something was different and they
8 tried to essentially figure it out to the best of their ability on a
9 daily basis. From reports that were going up, monitoring even all
10 the way up until the testimony you heard about removing individuals
11 from mail, how that could be a factor. So, again, yes, but those
12 aren't the facts here, Your Honor, and I think we'll explore that a
13 little bit more in a moment.

14 MJ: All right. Yes, Mr. Coombs?

15 CDC[MR. COOMBS]: Your Honor, I apologize. Could we have a
16 brief comfort break?

17 MJ: All right. Any objection?

18 TC[MAJ FEIN]: No, ma'am.

19 MJ: How brief is brief?

20 CDC[MR. COOMBS]: 10 minutes.

21 MJ: All right. Court is in recess.

22 [The Article 39(a) session recessed at 1341, 11 December 2012.]

1 [The Article 39(a) session was called to order at 1354, 11 December
2 2012.]

3 MJ: This Article 39(a) session is called to order. Let the
4 record reflect all parties present when the court last recessed are
5 again present in court. Major Fein?

6 TC[MAJ FEIN]: Yes, ma'am. Ma'am, we left off with me
7 transitioning to talk about communication between the Brig staff and
8 Private First Class Manning. Your Honor, you heard testimony from
9 every Brig staff member that communication is key for a confine for
10 the staff to assess the detainee's wellbeing. We also heard
11 testimony from Private First Class Manning that he spoke with
12 visitors over the weekend and during the holidays and you have the
13 recordings to hear if you so choose that conversations between all
14 parties. Yet you also heard testimony from every staff member
15 including Master Sergeant Blenis, his counselor, that Private First
16 Class Manning consistently did not communicate with them. There is
17 an exception and that was towards February timeframe when it came to
18 March Madness in basketball. Even--You even heard--Or what you
19 didn't hear also, Your Honor, is testimony from Private First Class
20 Manning to explain why he did or did not explain some of his odd
21 behaviors that the Brig officials testified about and knew about at
22 the time they were occurring. In fact at no point has there ever

1 been testimony that the odd behaviors were ever explained to the Brig
2 officials while----

3 MJ: Did they ever ask him?

4 TC[MAJ FEIN]: There's no evidence whether they asked him or
5 not, Your Honor.

6 MJ: Then how does he know he has to explain the odd behaviors
7 if he's not asked?

8 TC[MAJ FEIN]: Yes, ma'am, but after the 138 complaint was--was
9 submitted and responded to this is information that was documented
10 and provided to the defense and to the accused and yet still never an
11 explanation when given an opportunity to explain. Your Honor, it is
12 clear from the evidence that has been presented over the last 2 weeks
13 and the defense's argument even today that Private First Class
14 Manning chose not to talk with the confinement officials for a
15 majority of the time. The reason why the United States isn't going
16 to conjecture but there were not conversations to the level or like a
17 modicum amount that would allow the Brig officials to truly assess
18 Private First Class Manning. And that could range just from walking
19 by and saying, hi, and seeing what type of response they would get
20 back as you heard that testimony to sitting down with actually a
21 Gunny Blenis to talk about any subject he kept trying to understand
22 from chess, but chess was not what Private First Class Manning
23 preferred, to recommending Sudoku for intellectual stimulation, any

1 of these conversations what you heard was there was very few little--
2 or very few responses back during these sessions.

3 MJ: In the government's view, did then Gunnery Sergeant Blenis
4 or Chief Averhart or Master Sergeant Papakie ever talk to PFC Manning
5 and say, look, you've got to start communicating more about your
6 feelings and what you are feeling or not feeling if you want to make
7 a change in your status?

8 TC[MAJ FEIN]: Ma'am, there's no evidence of that overt
9 statement was ever relayed directly to Private First Class Manning
10 but what is--what is clear is they always tried to elicit it from
11 him. The United States could guess--doesn't know why they did not
12 ask directly, why are you not talking to us, but the evidence, Your
13 Honor, shows when given the opportunity in a formal environment to
14 talk, very little to any conversation occurred and that was during
15 the 21 January C and A Board, the back and forth and then it stopped.
16 Every time someone tried to engage him it just--from the Brig,
17 Private First Class Manning did not necessarily respond and
18 continually respond to it.

19 MJ: What's the government's position to the defense argument
20 that there was no follow-up once the--on the 21 January when the
21 initial statement was that--the original statement that PFC Manning
22 made, always planning, never acting, may have been false and then the
23 follow-up question, well, if that was false what assurances do we

1 have or something to that effect that the current statements you are
2 making about not being suicidal are also false?

3 TC[MAJ FEIN]: Yes, ma'am. Without being there at the time
4 the United States is not going to guess on why they didn't but they
5 asked the questions. They felt--They stopped the line of questioning
6 when they felt they received a--the ultimate responses they were
7 going to get. The history, as you have heard from the testimony was
8 he gave very short responses from Private First Class Manning. It
9 would be--He would not elaborate and that seems to exactly what
10 played out even from Private Manning's testimony about the situation
11 or about the meeting in the Board. So, I don't think it would be--
12 it's reasonable to necessarily infer that they should have asked one,
13 ten, thirty more questions to him when all they have been trying to
14 do is ask questions. They finally ask him about it and even, Your
15 Honor, the evidence presented to the court, he even had a rehearsed
16 answer he could have given from 3 days prior. That's on the video.
17 That was on 18 January, he talked to Master Sergeant Blenis and
18 discussed the news, discussed his statement he wrote on the
19 indoctrination paperwork, that was 3 days prior. So, now in the
20 Board apparently or allegedly flustered deciding not to talk about
21 it. So, once the--The government would just argue that once--once
22 they received the answers not that they were necessarily looking for,
23 they were asking him to explain, but once he gave the answers that

1 they came to know as being the normal there would be no reason to ask
2 more questions.

3 MJ: All right.

4 TC[MAJ FEIN]: So, Your Honor, going back, it is unclear to the
5 government because the government is not in a position to know why or
6 how the defense, Private Manning made a decision to vocalize with the
7 Brig officials throughout the Fall. What you did hear during
8 argument today from the defense that he was being advised--Private
9 Manning was being advised to be patient and be there, that is
10 consistent with the evidence that the Brig officials saw which was he
11 wasn't communicating, that he seemed to being patient and there
12 wasn't much during that time as being communicated to the Brig. So,
13 what's important, Your Honor, of courses are timelines, you know,
14 from the beginning of August until technically 29 July 2010, but the
15 beginning of August until the December time-frame, that--really
16 December 10th when Chief Averhart finally increased the recreation
17 hall after Captain Hocter made that recommendation, followed his
18 recommendation, during that time, the testimony you heard is there's
19 been very little to no communication by Private First Class Manning.
20 He was being patient. He was--He was either following the advice,
21 the government does not know, but based off of the testimony there
22 was very little communication.

1 MJ: Will you be talking about the exercise time down later on
2 in your argument?

3 TC[MAJ FEIN]: I can, Your Honor, now.

4 MJ: What is the--I mean it appears the facts are clear, there
5 was 20 minutes of sunshine call from PFC Manning's arrival until
6 December 9th. What is the government's understanding of what is
7 required for recreational sunshine call?

8 TC[MAJ FEIN]: One moment, Your Honor.

9 MJ: Or is anything required?

10 TC[MAJ FEIN]: Your Honor, the United States does concede it is
11 confusing according to the regulations. But, what--what is not so
12 confusing, Your Honor, is there is recreation call, there is--there
13 is--there is sunshine time, there's recreation, there's exercise
14 activity, but what the regulation establishes is that recreation
15 includes, recreation itself includes physical and non-physical
16 activities.

17 MJ: Great. What I am looking at is what is the requirement for
18 physical activities if there is any?

19 TC[MAJ FEIN]: Your Honor, the United States contend that there
20 is not one under the status that Private First Class Manning was in
21 at the time.

22 MJ: How does the--I understand it's under disciplinary
23 segregation, but it talks about 1 hour is required. Which kind of

1 leads to the unusual requirement to have someone under disciplinary
2 segregation required to have an hour of physical exercise, but
3 everybody else not?

4 TC[MAJ FEIN]: Yes, ma'am. Ma'am, the United States would
5 contend that disciplinary segregation in the regulation is written as
6 a punishment. That is a--That allows the Brig, it allows Navy
7 facilities to place someone in that status so it has written in an
8 affirmative requirement. So, even if you punish an individual you
9 must afford them the minimum of this. But even under the--Even the
10 NAV Regulation, Your Honor, or NAV Provision just like in the rest of
11 the regulation it is still tailored to individual concerns or
12 individual detainees and the application of that. That's why we go
13 back to the term of recreation, according to the regulation is much
14 broader then what was being applied, the terminology alone, not hat
15 was actually being given to Private First Class Manning. So, for
16 instance when you go to the first handling letter after the initial--
17 the first one signed by Chief Averhart, 11 August, Chief Averhart
18 ordered the 20 minutes of sunshine call will happen in the special
19 quarters rec area. Also, said 1 hour of correspondence time, so
20 right there is more than 1 hour of recreation, physical and non-
21 physical activities.

22 MJ: So, correspondence time in the government's view is
23 considered recreation?

1 TC[MAJ FEIN]: Yes, Your Honor, according to the SECNAV.
2 MJ: Where in the SECNAV?
3 TC[MAJ FEIN]: May I have a moment, Your Honor?
4 MJ: Yes.
5 TC[MAJ FEIN]: Your Honor, Page 615, 6-15, Paragraph 6314, it's
6 titled Recreation.
7 MJ: 6-15?
8 TC[MAJ FEIN]: Yes, ma'am. Includes television, library usage
9 or book reading, it does also include weight lifting equipment or
10 organized athletics, movies. So, the United States would contend,
11 Your Honor, is that when the Brig COs Chief Averhart ordered
12 prevention of injury in max status, custody level, excuse me, he put
13 a special instruction in place to ensure that his--that his--his
14 supervisors, his guards ensured that Private First Manning did
15 receive this 20 minutes of sunshine call, included within or in
16 excess of the minimum requirements of recreation.
17 MJ: Major Fein, correct me if I'm wrong, there was some
18 testimony that the SECNAV Instruction was geared primarily for post-
19 trial prisoners versus pretrial detainees because I'm noticing after
20 the recreation section there, there is a PT section that----
21 TC[MAJ FEIN]: Yes, ma'am.
22 MJ: ----makes PT mandatory and apparently that wasn't done in
23 this facility?

1 TC[MAJ FEIN]: No, ma'am, that's precisely correct. The
2 testimony was that the reg is written really for like a Level 1 or
3 Level 2 facility and I know the BUPERS that further interprets it
4 actually lays out the level--the levels of the facilities and are
5 kind of silent on pretrial and unfortunately--well the United States
6 would contend because typically pretrial's are only there for 30 to
7 90 days and the regulation is somewhat silent on it. So, the Brig
8 COs would have to adapt from those rules and make their decision. So
9 such as 20 minutes of sunshine call plus the 1 hour, if you move
10 forward, Your Honor, although--going to October 20 minutes of
11 sunshine time, 1 hour correspondence time and then started having TV
12 privileges so on and so forth in addition.

13 MJ: What is the government's position with respect to the
14 Brig's own policy of 1 hour physical recreation, let me find it,
15 Paragraph 2007 on Page 18?

16 TC[MAJ FEIN]: Yes, ma'am, well first as the court reads that
17 Paragraph 2007, sub 1, first it is within the plan of the day which
18 is--as you heard testimony the plan of the day is for every confinee
19 but has to be tailored per individual depending on their special
20 handling instructions. So, I think that is the general requirement
21 would be the same as a--a company or battalion training schedule for
22 the next 6 weeks out. Here's what's planned but as the day comes

1 different events could occur. Here it would be based off of each
2 individual's special handling instructions.

3 MJ: Well, it says 1 hour, it doesn't say 20 minutes?

4 TC[MAJ FEIN]: No, ma'am. Or yes, ma'am, that is correct. That
5 saying, Your Honor, it says specifically it says, "within the plan of
6 the day". 1 hour of exercise----

7 MJ: To ensure that prisoners receive at least 1 hour of
8 exercise in accordance with the plan of the day. So, that means that
9 they don't ensure that they get an hour of exercise or they do?

10 TC[MAJ FEIN]: No, ma'am, that is what the plan of the day
11 incorporates 1 hour of exercise time for the essentially general
12 population detainees. But if an individual detainee has special
13 handling instructions then it would be altered from there. This is
14 really focused on the plan of the day or what all other general
15 population do--would perform. So, when it comes to Quantico, at the
16 time, all the other detainees that are not on max custody, it would
17 be general population although in special quarters, would all be
18 brought out together and would get 1 hour of--of exercise in
19 accordance with the plan of the day. And then anyone who is in
20 special quarters and under a special custody or status, then theirs
21 would be executed according to the classification, or the handling
22 instruction.

1 MJ: So, my understanding of your testimony the hour of exercise
2 is for the general population for--the plan of the day should
3 incorporate an hour of exercise for the general population?

4 TC[MAJ FEIN]: Yes, ma'am.

5 MJ: And that does not include maximum custody prisoners?

6 TC[MAJ FEIN]: It did not include--No, ma'am, because it doesn't
7 say that. The United States just contends that each individual
8 detainee would have their special handling instructions and that is
9 what would regulate in that term.

10 MJ: Paragraph 2 talks about a separate area for people who
11 cannot participate in the general population recreation call due to
12 custody or current handling requirements.

13 TC[MAJ FEIN]: Yes, ma'am.

14 MJ: And that they shall receive recreation call in accordance
15 with the plan of the day and their handling letter. Now, this
16 paragraph is silent with respect to amount of exercise. What's the
17 government's view?

18 TC[MAJ FEIN]: Well, ma'am, that's actually where drawing the
19 handling letter from is that handling letter itself absent it
20 violating some other regulation an actual, you know, regulatory
21 requirement, is what governs what a detainee does or does not do
22 throughout the day. The plan of the day is the standard for the
23 general population unless there is some exception by handling letter.

1 And that's where--So, this language in Paragraph 2 says, plan of the
2 day, and their handling letter.

3 MJ: Is there any case that the government is aware of that has
4 gone through the military, any Article 13 case addressing amount of
5 exercise time?

6 TC[MAJ FEIN]: No, ma'am.

7 MJ: Go ahead and proceed.

8 TC[MAJ FEIN]: Ma'am, the United States would like to now
9 discuss the Brig official's decision making. The courts defer to
10 confinement officials and review their actions for abusive discretion
11 *Adcock*. By necessity Navy Instructions vest discretion in Brig
12 commanding officers to make classification decisions based off the
13 facts known to those Brig officers at the time, not--not future facts
14 or--or allegations. That's *McCarthy* and actually *McCarthy* has stated
15 before interpreting the predecessor to the current SECNAV. A
16 detainee cannot dictate the terms of his confinement because it is
17 confinement is within the discretion of the confinement authorities.
18 Again, *McCarthy*. The detainee cannot question the discretion of the
19 confinement authorities by arguing a less restrictive confinement
20 would have necessarily achieved the same government interest.
21 Because again, it is viewed at the time through the eyes of the Brig
22 COs. So, specifically in *McCarthy*, Your Honor, the court held that
23 based on the information at the time the Brig officials such as

1 knowledge of the charges that were pending, and their implications
2 for sentencing, breach of prior protection--restriction or protective
3 orders, allegations of threats or possible flight described in the
4 commander's memo--confinement memo, that the Brig authorities placed
5 McCarthy in max custody. CAAF specifically held that McCarthy's
6 "subsequent good behavior does not serve to revise the facts as they
7 exist and were known to the Brig authorities at the time of
8 classification". Additionally, CAAF even noted at the time of
9 McCarthy, McCarthy himself complained throughout his confinement of
10 his conditions to his jailers and he did it either personally or
11 through his counsel throughout his confinement. Here, Your Honor,
12 the Brig commanding officer did not abuse their discretion by
13 determining that the accused should remain in max custody and POI
14 status based off the factors listed in the Navy Instruction and facts
15 known to them at the time of making their decisions.

16 MJ: Talk to me about McCarthy.

17 TC[MAJ FEIN]: Yes, ma'am.

18 MJ: How long was--What are the facts of that case?

19 TC[MAJ FEIN]: Yes, ma'am. Your Honor, McCarthy was placed in
20 max custody at first the underlining offenses are not related at all
21 to this case. Although it was serious offenses including indecent
22 acts with a minor. He was placed in max custody and the total time
23 for max custody--I'm sorry, Your Honor.

1 MJ: It's all right. I asked you a question out of the blue.

2 TC[MAJ FEIN]: Your Honor, he was in max custody from January
3 31st to February 22nd 1994. So, a little under 30 days, Your Honor.

4 MJ: So was the initial custody determination ever reviewed?

5 TC[MAJ FEIN]: Your Honor, I don't think that ever--I mean I
6 can't answer that. It never came up in the appellate case.

7 MJ: All right. Let's move on. I've got *McCarthy*.

8 TC[MAJ FEIN]: Yes, ma'am. Well, ma'am, was there a question,
9 there could just be another case that we could, if there was a
10 specific question.

11 MJ: No, that is fine. In *McCarthy* the decision was made by the
12 Brig officer in absence of any C and A Board at all.

13 TC[MAJ FEIN]: Yes, ma'am, and again, I mean that is one factor
14 and the point again no--no complaints--I'm sorry, he did continually
15 complain to them and the court--the trial court considered all those
16 factors and held that there was not Article 13 violation.

17 MJ: Okay. Proceed.

18 TC[MAJ FEIN]: Now, Your Honor, if--if--the reason I ask the
19 previous question, Your Honor, is because in *Crawford* the pretrial
20 confine was held for 9 months on max custody. And specifically held,
21 I mean, like--it--so *Crawford* is another good case, Your Honor, more
22 analogize to this case, these facts, you know, visits by family
23 members, *et cetera* meant that the individual even though on max

1 custody was not in isolation probably the most analogies substantial
2 evidence--excuse me, subsequent behavior does not play into the Brig
3 official's decision. They incorporate in the *McCarthy* line of
4 reasoning. So, Your Honor, the defense counsel raised the issue of
5 Private First Class Manning's reported respectful and courteous
6 behavior at the JRCF is consideration for reviewing confinement
7 staff's decisions. On one hand the government would argue under
8 *McCarthy, Crawford* that that should not even be a relevant
9 consideration by this court to determine whether the Brig officials
10 abused their discretion.

11 MJ: Well, let me ask you a question on that then. When the
12 Brig officials are meeting week, after week, after week is the
13 government telling me that they are not to consider the behavior of
14 the accused?

15 TC[MAJ FEIN]: No, ma'am, that is not it. I'm talking about
16 future behavior should not be considered by this court today to judge
17 the behavior or the decisions of the Brig COs when they were making
18 it. The court should be--should be--should be standing in the shoes
19 of the Brig COs at the time they were making the decision.

20 MJ: I understand.

21 TC[MAJ FEIN]: So, as previously stated, on one hand the defense
22 wants to argue because the JRCF and because how Private First Class
23 Manning according to--according to Captain Casamatta, his testimony,

1 First Sergeant Williams, and even Private Manning's testimony once he
2 got to the JRCF it was a completely different experience that was
3 much--it appears to be much more positive and even Colonel Hilton
4 testifying but what is odd is when all that was true, then Private
5 First Class Manning attacked a Soldier. So, on one hand the defense
6 wants you to consider that to determine whether the determinations of
7 the Brig COs was reasonable or not. So, if the court decides to use
8 that as a consideration then the United States offers that other--in
9 addition to that it should be that once the--once the conditions were
10 relaxed, Private First Class Manning then had the opportunity and did
11 it attacked a Soldier. And so that was a concern, although not one
12 we heard much testimony about but it was one of the original concerns
13 was an Article 128 violation. An assault violation, that was one
14 concern of the Brig COs and that was on the original confinement
15 order and the memorandum and in the packet they considered as they
16 were making decisions. But more importantly, Your Honor, the United
17 States would offer that even the conduct at the JRCF could be
18 relevant for a different reason and that is to--for the court to
19 understand when reviewing trying to step in the shoes of the
20 confinement officials what Private First Class Manning's baseline
21 behavior was. The defense had contended that--that Private First
22 Class Manning was always courteous and polite and respectful and the
23 United States doesn't contest that except for when there was erratic

1 behavior prior to showing up to Quantico, prior to showing up to the
2 facility in Kuwait and culminating with, at least currently, with the
3 assaults at the JRCF.

4 Private First Class Manning's baseline behavior was erratic
5 and consistently caused concerns to those charged with maintaining
6 his wellbeing and that's what the testimony you've heard from the
7 Brig officials. This was true again while at Quantico, Iraq, and at
8 the JRCF. And specifically, Your Honor, again for you to be able to
9 view without being able to literally going back in time and step in
10 their shoes and see, they were trying to assess Private First Class
11 Manning on a daily basis to understand. Knowing what happened in
12 Kuwait including the multiple outbursts, being unresponsive to
13 commands, yelling uncontrollably, losing complete control by
14 screaming, shaking and babbling, placed on suicide risk after that,
15 reported very regressed, guarded previously disorganized, felt
16 suicide was an option, when asked the statement I before did not
17 remember it was not right now, that is always an option about
18 suicide. That is what they considered, but again, his baseline,
19 these types of behavior issues for Private First Class Manning the
20 individual occurred in Iraq and that information you have in front of
21 you from Master Sergeant Adkins' counseling statements that this is
22 the baseline of Private First Class Manning. This is what the Brig
23 saw every day. The doctors did show up, did their forensic

1 assessment, gave their one to five line recommendations, but this is
2 the behavior and culminated at the facility, Your Honor, on January
3 18th during the anxiety attack in the morning and then the subsequent
4 anxiety attack with the Brig officials, excuse me with Master
5 Sergeant Papakie and Chief Averhart. And then it happened again not
6 necessarily to the level of an anxiety attack but with the comment
7 about using--possibly using underwear or could use underwear to kill
8 himself.

9 So, ultimately, Your Honor, as you view--as you step into
10 the shoes of the Brig officials to determine if they were being
11 reasonable or not, or excuse me, abuse their discretion or not, the
12 United States would argue that the court should consider that Private
13 First Class Manning's anxiety attacks and behavior were normal for
14 him and that's what the Brig was--was dealing with, knew about and
15 had to--had to protect and--and try to communicate with him to be
16 able to gauge whether it would occur, would not occur, so on and so
17 forth.

18 MJ: In the government's view did there at any point in time as
19 Kuwait becomes a more distant memory in these weekly C and A Boards,
20 would it become an abusive discretion not to engage with mental
21 health providers to have some understanding of the accused's mental
22 health condition as it is used in whole and part as a justification
23 for POI?

1 TC[MAJ FEIN]: Well, ma'am, I think the evidence shows that,
2 that did occur.

3 MJ: Under Chief Barnes?

4 TC[MAJ FEIN]: Well, ma'am, when Colonel Malone came on board
5 there is testimony both from Colonel Malone and Master Sergeant
6 Blenis that they tried to---they did---they established more, I think
7 the answer--or the testimony was it was more communication between
8 the two and then when Chief Barnes came on it continued with Colonel
9 Malone and then culminating Colonel Russell although only twice with
10 Lieutenant Colonel Russell based off the timing. So, Your Honor, I
11 think that again, under similar to what I answered before, if this
12 was the only factor that was being considered by the Brig was what
13 was said in Kuwait, what was said in the indoctrination, and nothing
14 else then yes, I think there would be some point in time. But that
15 is not the evidence before the court. There is many factors that
16 they were considering and the number one was this communication issue
17 of whether to communicate, whether to talk about what you said and
18 that's what you heard from Master Sergeant Blenis. Let's--He tried
19 to engage Private First Class Manning on daily activity knowing--you
20 even heard from Private First Class Manning, Your Honor, that he
21 liked--he's a current events guy. He loves current events. Master
22 Sergeant Blenis tried to talk to him about current events and only a
23 few times did he ever respond back to that. That was there--That was

1 one of their main focuses in order to gauge today. That is what they
2 would use to determine if--if you should give Kuwait--the statements
3 in Kuwait more weight today or not. Because of course as time goes
4 on older factors could lose weight in this calculus but depending on
5 what the factor is, it could have an incredible amount of weight up
6 front. A good example, the Charge Sheet, you know, if--as the cases
7 show if was a single-spec AWOL case and it was max custody, POI
8 probably 90 days later and it's AWOL and not desertion then--then
9 first off the max penalty is probably past if you go more than 6
10 months. That's a factor. But when you have what's on the Charge
11 Sheet that they are weighing that that is a very large factor.
12 Similarly, Your Honor, someone who has no mental health conditions,
13 prior to Kuwait so this isn't even stem from pretrial confinement,
14 it's in the medical records that he--that Private First Class Manning
15 visited mental health providers prior to going into pretrial
16 confinement.

17 MJ: Did the Brig officials know that?

18 TC[MAJ FEIN]: It was in the medical records and the doctors
19 knew it, yes, yes, Your Honor, and so did the Kuwait officials.

20 MJ: Did the Brig officials know that?

21 TC[MAJ FEIN]: Your Honor, the testimony we heard from the Brig
22 COs is that they discussed the initial medical, his background for
23 suicide with them.

1 MJ: Who discussed?

2 TC[MAJ FEIN]: Chief Averhart, Your Honor, and I think it was
3 Gunny Blenis because he was the counselor. Now to what detail, Your
4 Honor, no, the United States does not know exactly which facts were
5 pulled. But as the court knows from at looking at the enclosures to
6 the motion the facts from the medical records are there from the
7 Altus System of what the individuals downrange pulled and what was
8 transferred here and could be pulled from Colonel Malone and Captain
9 Hocter and Colonel Russell. So, so, we're not just--again, it's the
10 individual and in their shoes. They knew they had someone who had a
11 history of--of--of--of mental health concerns. They knew they had
12 someone who had a diagnosed disorder. They knew they had someone who
13 ended showing up to confinement in Kuwait had the different anxiety
14 attacks outburst, etcetera and made suicidal ideations and
15 statements. They had someone who when showed up--the day he showed
16 up to the Brig when given the opportunity to fill in whatever it was
17 he chose, Your Honor, and going back to the same form, when you look
18 at the page filled out this wasn't necessarily filled out in darkness
19 or made to be filled out. On the same form on the same page the
20 question is, "when was your last HIV test?" The exact date was
21 filled out on the last HIV test. "When was--"Have you ever
22 considered suicide? I always planned, never acting." Then when you
23 get down to the bottom mental health background information. Note:

1 Is there anything on this form which is not covered, sports, hobbies,
2 special skills? It's filled out with some detail here. Computers,
3 technology, politics, history, finance. So this isn't simply someone
4 who's so distraught that they're just filling something in to get
5 done with it. It's someone who's thought it out. And when you look
6 at the rest of the document this is what's being considered by the
7 Brig officials. So, the reason I bring this up now, Your Honor, is
8 that is given much weight. So, you asked if there's enough time that
9 goes by could it be abusive discretion if they don't seek furthering
10 opinion or don't address this. If that was the only consideration,
11 yes, Your Honor, but that was not. That's not the facts here.

12 So, Your Honor, what the United States would like to
13 highlight for you are some key essentially undisputed facts about
14 this case, this issue for Article 13. First, PFC Manning made two
15 nooses in Kuwait, one was either was or wasn't with ties but it was
16 one bed sheet noose, actual noose in Kuwait. During his in-
17 processing in Quantico PFC Manning checked yes to the question of
18 have you ever considered suicide and then wrote voluntarily always
19 planning, never acting.

20 Major fact two, on 18 September 2010, when asked about
21 David House and Daniel Clark about PFC Manning's prevention of injury
22 status PFC Manning specifically stated, I quote, "It's unusual. My
23 circumstances are not common and they are not too bad and I

1 understand it all." That's at 23 minutes and 20 seconds on the 18
2 September 2010, report.

3 MJ: 23 minutes and what?

4 TC[MAJ FEIN]: 20 seconds, Your Honor.

5 MJ: And what did he say again?

6 TC[MAJ FEIN]: Your Honor, when asked about it he said, his
7 status or the way he is being treated isn't it unusual, "my
8 circumstances though are not common." Excuse me, Your Honor, I added
9 "though." Are not common and they are not too bad and I understand
10 it all. On 18 January 2011, Private First Class Manning had an
11 anxiety attack in the recreation room that left him in tears and
12 later had a similar episode with Chief Averhart. During the 21
13 January C and A Board PFC Manning stated about the statement, always
14 plan, never acting, that it may have been false. On 2 March,
15 jokingly or not, PFC Manning made a statement about how he could kill
16 himself with the elastic in his underwear. After March 2011 the
17 amount of communication between PFC Manning and Master Sergeant
18 Blenis and Chief Barnes degraded significantly. Almost weekly----

19 MJ: When was PFC Manning counseled for disrespect with Chief
20 Barnes?

21 TC[MAJ FEIN]: May I have a moment, Your Honor?

22 MJ: Yes.

23 TC[MAJ FEIN]: Your Honor, it was around 3 or 4 March.

1 MJ: Okay.

2 TC[MAJ FEIN]: Your Honor, almost weekly Private First Class
3 Manning described the Brig staff and the treatment by the facility as
4 professional or very professional and that was to his company
5 commander and first sergeant that he thinks they are the best there
6 are. Between 18 September 2010 and 10 April 2011, Private First
7 Class Manning did not share any of his concerns with anyone he
8 visited about his confinement status, at least that was recorded.
9 Your Honor, after being provided over 1200 emails to utilize during
10 direct and cross-examination the fullest opportunity to discuss with
11 14 members of the Quantico and Brig staff every individual testified
12 that the purpose of the status and custody was to protect Private
13 First Class Manning from harming himself and ensuring he ultimately
14 got to trial. Private First Class Manning was not denied any mental
15 or physical health care except when there was a report of Private
16 First Class Manning killing himself on the TV and his TV privileges
17 were revoked. Private First Class Manning was not denied TV call,
18 recreation, telephone privileges, three hot meals per day, a shower,
19 and correspondence time. PFC Manning was authorized to visit with
20 his defense counsel over the phone, in person, and not at Quantico,
21 at Fort Meyer TDS Office and other offices such as SCIFs in the
22 National Capital Region. He was allowed visitors every weekend and

1 on holidays and he met with medical professionals both in the Brig
2 and outside the Brig.

3 And finally, Your Honor, the defense has offered no
4 evidence of any Brig staff's intent to punish Private First Class
5 Manning. Your Honor, in a specific--a very specific point so this is
6 not necessarily an uncontested fact that the government would argue,
7 one of the course requirements under Article 13 is that the--the
8 conditions are not more rigorous than necessary. During oral
9 argument defense stood up here and say if Quantico Brig had the
10 opportunity to put him in a strait jacket, Private First Class
11 Manning in a strait jacket in a padded cell, they would have taken
12 that opportunity. They would have done whatever it took. Your
13 Honor, the facts before you are completely contrary to that. You
14 heard multiple witnesses testify about Special Quarters 2 that they
15 had at Quantico. A steel door that shut. No natural light at all,
16 at the end of the hallway or in the skylights like Private First
17 Class Manning had in his cell. And instead of a mesh bar front it
18 was bars with a steel door that closed and only a window, which would
19 give you four enclosed walls and only a window. They did have that
20 at their disposal and they didn't use it. They did not take the
21 most--the most restrictive approach with Private First Class Manning.
22 They tailored it each week. Unfortunately it just didn't change each
23 week because their assessment did not change each week.

1 MJ: Major Fein, what's the government's position on the defense has
2 argued to the court that the officials at Quantico, kind of the
3 POI/max custody was a safe position to take because even if there is
4 the most remote concern for--that PFC Manning would injure himself
5 the Brig officials are "covered" I guess if you will?

6 TC[MAJ FEIN]: Yes, Your Honor, the safest position would be
7 suicide risk the entire time. That's the safest.

8 MJ: Well, they can't do that without the doctor.

9 TC[MAJ FEIN]: Correct, Your Honor, but that would be the safest
10 or they could have--yes, Your Honor. No, Your Honor, there's no
11 question that what was on--there's no question from the evidence
12 presented that Captain Webb's suicide was on everyone's mind
13 including General Flynn's and that email on 9 August 2010. But what
14 you heard was that every individual who made custody classification
15 decisions, or not decisions, but input and decisions so within the
16 confines of the walls of the Brig, they reviewed, each week they
17 reviewed the facts presented to them, what they observed, the
18 different observations, they spoke about it, the Brig COs did their
19 own rounds. Every individual had these decisions--had these
20 discussions, they tried to talk to Private Manning and they made the
21 decision. Yes, there were questions, yes, their concern was to get
22 him here to trial to ensure nothing happens to Private Manning from
23 self-harm, other harm, or he escapes but that's their job. That's

1 their job for all confinees. But there--The United States would
2 argue that there is no evidence that they took it to an extreme.
3 They followed the due process that's afforded from the SECNAV Reg.
4 They recorded the due process in CORMIS and on the Brig forms and
5 when--when a complaint was finally lodged the Article 138, that
6 process went up through and then came back down. That process was
7 followed, Your Honor, the due process was there and they didn't take,
8 again, they didn't take the most extreme position. They did take a
9 very protective position but again, it was based off the facts that
10 were presented at the time.

11 MJ: What is the government's position, there was a lot of
12 testimony that POI status is normally for a short duration and in
13 this case it went on for 9 months?

14 TC[MAJ FEIN]: Yes, ma'am.

15 MJ: What's the government's position with respect to that?

16 TC[MAJ FEIN]: Your Honor, the United States would argue based
17 off all the other testimony is that once again, this case it's the
18 factors presented to them at the time. So, also what you heard in
19 the same individuals who said they don't remember POI going for
20 extended periods also talked about they've never had or maybe one
21 total detainee who's never spoken or communicated consistently with
22 Brig officials. So, for every individual who said they don't
23 remember POI or don't know if POI went on for extended period they

1 also didn't have that. Additionally it's the factors here and it's
2 everything listed before the pattern.

3 MJ: There was some testimony about some kind of an MOI for
4 Quantico when it transitioned from Level 1 facility to a pretrial
5 detention Brig. Is that in the exhibits anywhere?

6 TC[MAJ FEIN]: No, ma'am, I think--are you talking about the MOA
7 between--the Memorandum of Agreement?

8 MJ: Whatever they were--There was testimony that there was
9 something.

10 TC[MAJ FEIN]: May I have a moment, Your Honor?

11 MJ: Yes.

12 TC[MAJ FEIN]: Ma'am, the--I'm answering this as the previous
13 Chief of Justice of the MDW, not from this case. First the testimony
14 was that the DoDI established this was in Chief Galaviz, establishes
15 that the closest pretrial confinement facility within DoD must be
16 utilized by all services. He even mentioned probably from a policy
17 standpoint it's on a non-reimbursement basis. That's in a DoD
18 Instruction. And to the best of my personal knowledge there are no
19 further implementations, I know there were MOAs being worked out to
20 do reimbursement but the DoDI is the regulation that rules on where
21 confinees go. So, once Private First Class Manning was assigned to
22 the US Army Military District of Washington and was moved CONUS to
23 this command he was then placed in that facility.

1 MJ: What if any length of detention, there was some testimony
2 about Quantico not being resourced to house long-term pretrial
3 detainees. What's the government's view on that?

4 TC[MAJ FEIN]: The United States does not contend that they were
5 not necessarily originally and properly equipped to do that, but the
6 same testimony was that they completed the mission. The testimony
7 actually starting with the very first day Colonel Choike talking
8 about coordinating with Colonel Coffman and the Army in order to
9 provide any resources needed in order to support the mission. But
10 that--all of that testimony was really about infrastructure on the
11 base, it was not about the confinement facility. There was no
12 testimony that certain, you know, there weren't enough guards to
13 accomplish a mission necessarily but what was talked about is once
14 they transitioned out of a Level 1 facility for instance, certain
15 programs didn't exist anymore. But, with that being said pretrial
16 confinees by Article 13 law are supposed to be treated like every day
17 Soldiers, so having a rehab program would not actually be applicable
18 to them. It's more about AA or NA programs in order for them to
19 rehab while they are waiting for trial. So, the United States would
20 contend there's no actual evidence that a mission could not be
21 completed and the evidence is to the contrary. For instance, medical
22 health care, Private First Class Manning, the testimony that came out
23 during these last 2 weeks essentially had dedicated mental health

1 providers for him, even though the rules required I think at a
2 minimum of 30 days depending on his status. The case law supports at
3 least every 30 days a check-up by a mental health provider but it
4 started off as daily, averaged almost about weekly and only one time
5 is there evidence that it happened that a mental health provider
6 wasn't there when someone wanted him there and that is when Colonel
7 Malone went on Emergency Leave unannounced. And after that, I know
8 you asked defense counsel during oral argument about Captain Neill in
9 the email chain and that was the result--that email chain was the
10 result for Quantico infrastructure, Colonel Choike ensuring there's
11 no--there's no laps in mental health providers if someone does leave.
12 So, from that point forward there was always redundant mental health
13 providers provided for Private First Class Manning. Which culminated
14 with Colonel Malone getting a call on behalf of the command from the
15 trial counsel the night before Private First Class Manning moved, the
16 same night that the defense counsel got warned about it ahead of time
17 that he was being moved, and Colonel Malone was then brought from
18 Quantico to the JRCF and back to ensure there's no lapse in care.

19 MJ: All right.

20 TC[MAJ FEIN]: Your Honor, in conclusion the court should grant
21 the defenses' motion in part. Grant 7 days credit for keeping the
22 accused on suicide risk for the two time periods previously discussed
23 and deny any other relief based on the defense not meeting its burden

1 of proof and the overwhelming evidence to the contrary of violation
2 of Article 13, R.C.M. 304 and 305.

3 MJ: Before we go any further.

4 TC[MAJ FEIN]: Yes, ma'am.

5 MJ: Let's talk about the 3rd of March, standing naked incident.

6 TC[MAJ FEIN]: Yes, ma'am.

7 MJ: The defense did bring--Why didn't the government--Why were
8 there no witnesses like Staff Sergeant Terry or anyone else who was
9 there?

10 TC[MAJ FEIN]: Ma'am, similar to what I was trying to explain
11 with the Article 138 complaint, that is a convenient argument for
12 both sides. Defense also had the opportunity to call any witness
13 from any of those emails in litigation.

14 MJ: I understand that. Why didn't the government?

15 TC[MAJ FEIN]: Yes, ma'am, the government reached out to Staff
16 Sergeant Terry, he frankly did not remember the facts that morning.
17 The only thing we were told so I proffer this as his expected
18 testimony is that he remembers counseling orally Private First Class
19 Manning to not--to not stand without his blanket on any more. We
20 tried to ascertain which guards were on duty that night. Staff
21 Sergeant Terry did not remember. So, the United States did try to
22 reach out to find those witnesses but couldn't. So, because Staff
23 Sergeant Terry proffered that's what he would have testify to, there

1 was plenty of testimony that that's what Staff Sergeant Terry told
2 his supervisors and they have already relayed that to the court. So
3 the United States chose not to call Staff Sergeant Terry out because
4 he's at Camp Pendleton, California and it would be a waste to have
5 him testify with that one fact as it was already testified to. And,
6 Your Honor, the United States would contend that Private First Class
7 Manning's testimony on cross is probably the most accurate
8 representation of what might have occurred in absence of anyone
9 having a good memory of this occasion and that was he understood it
10 as an implied order to drop his POI blanket. The United States does
11 contest whether he was ever ordered to stand naked. In fact, the
12 evidence is to the contrary as to whether he was ordered to stand
13 naked. There is a female Brig CO at the time, all detainees are told
14 especially when there's a Brig or a female on duty that they need to
15 always cover up when they come on deck. It just doesn't make sense,
16 Your Honor.

17 MJ: The female Brig CO would she be there at the time of count?

18 TC[MAJ FEIN]: Not normally, Your Honor, but it doesn't mean she
19 wouldn't be there that morning. So, no, it wouldn't be normal
20 practice for Chief Barnes to be there every morning but as she
21 testified yesterday or this morning, yesterday, Your Honor, she would
22 do surprise inspections of her own. She was there on Saturdays.

1 MJ: Is there any kind of roster or any other listing of what guards
2 were working on the morning of the 3rd of March 2010?

3 TC[MAJ FEIN]: Yes, ma'am, there is--there is and defense and
4 the government have--there is a log that is used but the log is
5 silent on this as well. Actually, Your Honor, may I have a moment?
6 MJ: Yes.

7 TC[MAJ FEIN]: The log is inconsistently, unfortunately the log
8 is inconsistent not just on that day, on multiple days depending on
9 the shifts. Certain guards would write their own names, they
10 wouldn't for Staff Sergeant Terry's shift, it says Staff Sergeant
11 Terry was there but it doesn't list the actual guard names. The
12 government can provide this to the court if the court would like a
13 copy.

14 MJ: Yes I would, please.

15 TC[MAJ FEIN]: Yes, ma'am. Of the whole log, Your Honor, or of
16 just---

17 MJ: No, just that entry.

18 TC[MAJ FEIN]: Okay.

19 MJ: All right.

20 TC[MAJ FEIN]: Thank you, ma'am.

21 MJ: Mr. Coombs, you are about to stand up. Does that mean I am
22 going to get a reply?

23 CDC[MR. COOMBS]: Yes, but very briefly, Your Honor.

1 MJ: Okay.

2 CDC[MR. COOMBS]: Your Honor, according to the defense keeping
3 track of what each witness said for their bases for maybe max or POI
4 and we would request that the court obviously look at the actual
5 testimony. If there is any confusion, but here are the factors that
6 were listed. You had the anxiety disorder and that was a factor that
7 existed prior to PFC Manning coming to the Brig. So, that's a Kuwait
8 factor. You had poor home conditions and family relations. That was
9 self-reported by PFC Manning on his intake summary. You have the
10 Kuwait behavior which precipitated obviously him coming to Quantico
11 and caused him to come to Quantico. You had his actual statement on
12 the intake summary or the intake statement of always planning, never
13 acting. And then you had the--and so those were the pre-factors.
14 Those are the factors that existed before he got there. Then the
15 only factors that the witnesses ever really testified to was the
16 length of potential sentence and seriousness of charges which are
17 obviously related. And then over a period of time other factors came
18 to existence such as erratic behavior which the first time that's
19 documented is in November 23rd and of course there is no follow-up on
20 that and the doctors kind of discount that as being of issue along
21 with Lance Corporal Tankersly and Cline. Then you have the 18
22 January 2011 behavior, so now we are in January of 2011. Then you
23 have the 21 January 2011, statements to the C and A Board. You have

1 the 2 March underwear statement. And then you have the interaction
2 with the Brig staff, the communications. And again, looking at Gunny
3 Sergeant Blenis' counselings it--from the very beginning forward he
4 documents that PFC Manning's normal behavior is quiet, respectful,
5 courteous, sometimes he's talkative sometimes not so much. But never
6 is there any sort of documentation to indicate this is a major
7 problem or something that is causing the Brig to not be able to
8 adequately judge PFC Manning. It's not until really March of 2011
9 after the March 2nd comment and of course after Chief Barnes counsels
10 PFC Manning that you really start to see a change.

11 The Article 138 not having a lack of communication, that is
12 really probably the biggest red herring that has come out in the last
13 couple of weeks. The lack of communication, it was not within the
14 Article 138 response and you would vision that because the complaint
15 is you are holding me in max and POI, you don't have a justification
16 for that. And Chief Averhart when he's responding to that, of course
17 he's trying to get Gunny Sergeant Blenis to give him the reasons or a
18 reason, but lack of communication would be an easy reason to put down
19 there that, you know, we just don't feel comfortable with you because
20 you are not giving us enough information. And it's nowhere to be
21 found and it doesn't exist in any other sort of documentation to the
22 extent of giving that as a justification for not being able to keep
23 him or lower his status until you get to Chief Barnes. Also the 18

1 January video also kind of belies that concern because when you look
2 at that video, that's--clearly that's not somebody who has a
3 communication problem. He's able to talk quite eloquently to Master
4 Sergeant Papakie and Gunny Sergeant Blenis and if that was out of the
5 norm or something of a surprise you would expect to see either Gunny
6 Sergeant Blenis or Master Sergeant Papakie make a comment about that
7 of, wow, this is the most talkative you have ever been. And, you
8 know, if only you would say something like this earlier, maybe we
9 wouldn't be as concerned. And that's exactly what Chief Barnes said
10 she was looking for, him to articulate, hey, the stuff that happened
11 in Kuwait, only--you don't need to worry about that because of X.
12 And that's what he did on the video. He said, you know, I was
13 totally out of it. I didn't know what was going on at that time.
14 What Chief Barnes was looking for.

15 The recreation call, the court pointed out the Brig's own
16 policy but Galaviz, CW5 Galaviz and even CW2 Barnes said 1 hour of
17 rec would be the requirement. CW2 Barnes could not articulate a
18 reason why he'd only get 20 minutes of sunshine call for a period of
19 time that Averhart did unless there was some disciplinary reasoning
20 and there's some reason to take it away. But she said max would not
21 be 20 minutes of sunshine call. That would not be her to call.

22 MJ: Chief Averhart said something to the effect that that was
23 Brig policy. Is that your recollection of his testimony?

1 CDC[MR. COOMBS]: It was, yeah, and that's why when I went in
2 and asked him like, well, was there a time period when you said, hey,
3 let's expand it for an hour and his mindset was you were on max,
4 that's 20 minutes, that's all you get. But, Averhart, excuse me,
5 Barnes doesn't back that up with her experience. Galaviz doesn't
6 back that up with his experience. The Brig's own SOP when you look
7 at that, you almost have to do a plan of the day exception in order
8 to say, you only get 20 minutes.

9 MJ: Well, that's--what's the defense's position on that because
10 that Paragraph 2 is silent on the time?

11 CDC[MR. COOMBS]: It is and I think at that point that could
12 be read one of two ways. Either that 1 hour is implicit in Section B
13 and therefore you don't repeat it or that it is recognized and I
14 believe not just Chief Averhart but other witnesses testified that
15 with maximum detainees there are additional requirements that you
16 still have to fit within the plan of the day before Taps. So,
17 perhaps in that regard the Brig could say, well, we tried to give him
18 an hour but we could only give him 50 minutes on this day. That
19 would be their justification for that. But when you look at it, at
20 the sunshine call in this case, you not only have the time limitation
21 of 20 minutes but you have the arbitrary requirement of full
22 restraints on outside and handcuffed when he's--when he's on the

1 inside which Galaviz could not articulate why that would ever be the
2 case nor could Barnes.

3 MJ: Were they--Was that a Brig policy for all maximum
4 detainees?

5 CDC[MR. COOMBS]: It was not and in fact Averhart seemed to
6 take exception that that was the case. He didn't believe that was
7 the case. It's Master Sergeant Papakie's email that makes it clear
8 that that was the case. So, either that as something Averhart did
9 not believe they were doing and had he known he would have said, no,
10 no, no, you can take the restraints off of him or he just didn't
11 recall. But when you go back to his testimony and I asked him that
12 question he took exception to that would be the requirement. He
13 didn't believe that full restraints would be required outside and
14 handcuffs would be required while they are at the inside rec room.

15 The behavior being erratic is another justification as I
16 said, November is the first time that's ever really documented. And
17 even then how's that erratic behavior? That's never really followed-
18 up on. They never really go back to PFC Manning to talk to him about
19 it if that is, in fact a concern that they had.

20 MJ: Are they required to do that?

21 CDC[MR. COOMBS]: If--if--In this instance that the Board and
22 it looks like the C and A Board is, in fact, using this as an added
23 justification based upon the tick boxes. It's unclear that that's

1 for sure but it looks like the timing wise that's why they are doing
2 it. And you would think that at least the counselor would because
3 the counselor is making the advice to the Board. If the counselor
4 would go to PFC Manning and say, hey, look, you know, you are talking
5 to yourself, you are staring at the wall, you are playing peek-a-boo
6 with the mirror, you are pretending like you are fishing, what's
7 going on? And at least get some feedback on that. Boredom though, I
8 think is a very straight forward explanation for that and mental
9 health professionals seem to support that as certainly as Lance
10 Corporal Tankersly did.

11 PFC Manning has, when he got up on the stand, you know, was
12 very honest and straight forward in his responses. And he did say
13 the Brig was very professional and that Gunny Sergeant Blenis was
14 nice to him and he thought he was a good guy. PFC Manning didn't try
15 to throw the Brig under, you know, the bus in this instance. He said
16 they were very professional and you can be very professional and
17 still violate Article 13. That's what they did here. They were very
18 professional in the way they did things but contrary to what Major
19 Fein has said there is substantial record--substantial evidence in
20 the record to show that their response was exaggerated to the
21 conditions that they were looking at. And whether that was because
22 of how many people, echelons above them were paying attention to
23 this, the media interest, lack of personnel, whatever that was there

1 was an outside influence that caused them to do something different
2 and normally that's where you step off the rails. When you treat a
3 situation differently than you would otherwise and when you do that
4 you start doing things that you normally wouldn't do and that's
5 exactly what the Quantico Brig did here. They did a weekly report
6 they normally wouldn't do that. They probably stressed to everybody
7 to keep a very close watch on him to the point where everybody was
8 looking for something and the easiest course of action was to keep
9 him in max and POI. They might have even had good intentions to do
10 so but the problem was their intentions were not required and the
11 conditions were more onerous then necessary to ensure his presence.
12 Subject to your questions.

13 MJ: So, really Mr. Coombs at the end of the day this case is a
14 question about whether there are--the conditions are excessive in
15 relation to a legitimate government interest, which would be keeping
16 somebody safe and alive for proceedings?

17 CDC[MR. COOMBS]: Yes, if you look at not being an intent to
18 punish. So, the first part of me say, look the order by Colonel
19 Oltman or by Chief Averhart or the influence by General Flynn is not
20 an attempt to punish. Then yes you would go to whether or not the
21 conditions that they ultimately put him in were related to a
22 legitimate government objective. Our position would be that the
23 overarching theme when you look at everything, especially the context

1 of the emails is a concern with how is the media reacting to this or
2 who's--who is looking at this and what is their response? How is
3 this going to look on us? Every email when you look through the
4 emails, I would almost challenge the court to find an email where
5 they actually say, hey, we are really concerned about PFC Manning.
6 Because that's not at all a thread that's through these emails. The
7 thread that's through these emails is, and I will say with exception
8 to one there's an early email where General Flynn is saying I think
9 he is a suicide risk. You know, we need to, you know, we need to
10 really take a closer look at him. But other than that----

11 MJ: Mr. Coombs, is that really fair though? You have the
12 emails going on and the second and third of March getting mental
13 health providers down for PFC Manning when he's read the 138
14 complaint response and the new charges?

15 CDC[MR. COOMBS]: Right and what I would say is all these
16 emails show that there is a concern that if something happens it is
17 going to look bad on Quantico or it is going to look back for us in
18 some way or we are going to be the ones left holding the bag. 2
19 March and 3 March is no different. There they want to have somebody
20 right then and there if something happens they want to have mental
21 health professionals there and it is again because we don't want
22 anything bad to happen, because the way that will look to us. And
23 when they start to search for other mental health professionals it's

1 because they are not happy with the mental health professionals that
2 they've got and they want to have somebody that actually is going to
3 interpret his behavior, see him 24/7 and talk to them and tell them
4 based upon being the insider whether or not there is something going
5 on with PFC Manning. This is a prime example of if PFC Manning were
6 any other detainee they wouldn't go to this extreme on anything.
7 This is where you do things out of the ordinary and maybe you go into
8 that with good intentions and maybe you are thinking hey, we are
9 doing the right thing, but when you do things that are totally out of
10 the ordinary and you see this in court-martials as well if you take
11 steps that you normally wouldn't take that's when you go off the
12 rails and this is exactly what they did here. And they did it early.
13 If they would have listened to their mental health support or if they
14 didn't trust it and if they would have gotten the mental health
15 support that they did trust and followed their normal procedures,
16 it's more than likely PFC Manning would have been MDI relatively
17 quickly and the concerns, the media interest, the outside pressure,
18 all that stuff would never have existed because that stuff really was
19 created in the December timeframe when the conditions went from
20 trying to resolve it within the appropriate channels to then publicly
21 raising and airing this as a concern. And ultimately I believe that
22 is what resulted in PFC Manning being moved from Quantico to the
23 JRCF.

1 MJ: Before we stop, I know it's getting late here, government,
2 Major Fein, I have a couple more questions for you. What's the
3 government's position with respect to the 14 January meeting between
4 Colonel [SIC] Hocter and Colonel Oltman and the exchange that
5 occurred?

6 TC[MAJ FEIN]: Ma'am, the United States--it is unclear what did
7 or did not occur. What is clear was the result of that, Your Honor,
8 and the result was the testimony from the Brig officials from the
9 NCOs to the two warrant officers is that it did not affect their
10 decision making. So, what was or was not said, I don't think anyone
11 was contesting that Captain Hocter and Colonel Oltman did not get
12 along that day to what extent no one will know, I guess, but the
13 testimony was it did not affect the decision making of the Brig
14 officials both in the C and A process and the ultimate decision of
15 Chief Barnes and Chief Averhart.

16 MJ: And what about the position on Chief Averhart's entries
17 into the weekly reports reference PFC Manning remaining in POI/max
18 until the 706 Board is complete?

19 TC[MAJ FEIN]: Yes, ma'am, I think what's important there, Your
20 Honor, is to look at the timing of that. There's no question it was
21 written in there. Gunny Sergeant Blenis, Master Sergeant Blenis
22 testified that he was directed because he was the original drafter
23 for his CO of that report that the Brig CO told him to put in there.

1 Master Sergeant Blenis even said that they did not consider that as
2 part of the C and A process but he did what he was told for the
3 report purposes. But also he is to look at the timing of that. At
4 the timing was, was that he was tipped off that the 706 was supposed
5 to occur. He only placed that line in there for 3 weeks and it was
6 removed. So, it was not--it was not necessarily a consideration that
7 lasted even if it was a consideration. The United States does
8 contest as it elicited testimony that it was not an order. It wasn't
9 in the order section, it was very clear what was ordered or what was
10 not ordered.

11 MJ: All right. Defense, I don't have the same question for you
12 but if you want to address it go ahead.

13 CDC[MR. COOMBS]: Ma'am, just for the last one, the plain
14 reading of it and Galaviz read it, it is clear I direct is a
15 basically an order.

16 MJ: Is there anything else with respect to this issue?

17 TC[MAJ FEIN]: Ma'am, there is one other and this is just for, but
18 yesterday the United States indicated to the court that it would
19 highlight the emails between defense counsel and prosecution that are
20 directly on point for pretrial confinement. What we've marked now--
21 Well, not marked as a separate appellate exhibit but enclosure 50 to
22 the motion to Appellate Exhibit 259. We have - defense has a copy
23 and this is the individual emails from the speedy trial motion that

1 were between defense counsel and prosecution. There is a copy for
2 you, Your Honor.

3 MJ: So, those are the emails that I have back in the box back
4 in my office?

5 TC[MAJ FEIN]: Yes, ma'am.

6 MJ: All right and has this index been added as either an
7 appellate exhibit itself or placed in the record somewhere?

8 TC[MAJ FEIN]: Yes, ma'am, a copy of that is going to be placed
9 in the record as Enclosure 50 to the Government's response, Appellate
10 Exhibit 259.

11 MJ: Okay. Anything else with respect to the Article 13 motion?

12 TC[MAJ FEIN]: No, Your Honor.

13 CDC[MR. COOMBS]: No, Your Honor.

14 MJ: All right. As you all know it takes me time to transcribe
15 the witnesses. I am going to take this issue under advisement so I
16 can review the evidence in the case. So, you'll have a decision in
17 due course.

18 Is there anything else? I know I need to meet with the
19 parties to discuss the potential Grunden order that I'm going to give
20 with respect to scheduling. Is there anything else that we need to
21 address on the record?

22 CDC[MR. COOMBS]: No, Your Honor.

23 TC[MAJ FEIN]: No, Your Honor.

1 MJ: All right. So we have, before we recess the court, my
2 understanding is the next proceedings will take place the 8th through
3 the 11th of January of 2013. Is that correct?

4 CDC[MR. COOMBS]: Yes, Your Honor.

5 TC[MAJ FEIN]: Yes, ma'am.

6 MJ: And those will be addressing the recent motions that have
7 been filed by the parties with respect to judicial notice, motion to
8 compel defense witnesses, motion to preclude motive evidence by the
9 government and I believe that's it. Is there anything else that--oh,
10 and a potential government motion to preclude evidence of over
11 classification act. Is there anything else at this point that is to
12 be added to be addressed in that session?

13 TC[MAJ FEIN]: May we have a moment, Your Honor?

14 MJ: Yes.

15 CDC[MR. COOMBS]: Ma'am, the defense doesn't see anything else
16 unless we file a motion on the 28th to compel OCA witnesses.

17 TC[MAJ FEIN]: No other issues, Your Honor.

18 MJ: And that motion to compel then, that's also on the calendar
19 for that period of time. Is that correct?

20 CDC[MR. COOMBS]: It is, Your Honor, if we file the motion on
21 the 28th.

22 MJ: Okay. What time do you want to--go back to our default and
23 start at 1000 o'clock like we have been or do you?

1 TC[MAJ FEIN]: Probably 930, Your Honor, so we can get a good 2
2 and a half hours in before the lunch recess.
3 MJ: Any objection?
4 CDC[MR. COOMBS]: No, Your Honor.
5 MJ: Then we will begin on the 8th of January at 0930. Court is
6 in recess.
7 **[The Article 39(a) session recessed at 1510, 11 December 2012]**
8 **[END OF PAGE]**

1 [The Article 39(a) session was called to order at 1025, 8 January
2 2013.]

3 MJ: This Article 39(a) session is called to order.

4 Trial Counsel, please account for the parties.

5 ATC[CPT MORROW]: Your Honor, all parties present when the court
6 last recessed are again present with the exception of Captain Von
7 Elten, who is absent; Captain Overgaard is present.

8 The court reporter is also absent, Your Honor. Our last
9 court reporter was absent. The current court reporter is ----

10 MJ: That would be Mr. Robertshaw was the court reporter at the
11 ----

12 ATC[CPT MORROW]: Mr. Chavez.

13 MJ: ---- last session?

14 ATC[CPT MORROW]: What's that, ma'am?

15 MJ: All right, the court reporter at the last session was that
16 Mr. Robertshaw?

17 ATC[CPT MORROW]: That was Mr. Robertshaw; yes, ma'am.

18 MJ: And who is present today?

19 ATC[CPT MORROW]: Mr. Chavez.

20 MJ: All right, thank you.

21 ATC[CPT MORROW]: Sorry.

22 MJ: All right, let's begin by going over some -- well, Major
23 Fein is also not here; is that correct?

1 ATC[CPT MORROW]: That's correct, ma'am. We were under the
2 impression that it was going to be 5 minutes. He had stepped out for
3 a second. If you ----

4 MJ: All right. Well is there any reason we can't continue
5 while he's ----

6 ATC[CPT MORROW]: No, ma'am.

7 MJ: ---- stepped out? All right.

8 For the record, Major Fein was present when the court last
9 recessed; he's not present today, or at least not right now.

10 All right, Government, are you prepared to go forward with
11 the housekeeping matters or was that something that Major Fein was
12 planning on doing?

13 ATC[CPT MORROW]: That was something Major Fein usually handles,
14 Your Honor, so we are not prepared to go forward.

15 MJ: All right. Well, then, until Major Fein gets here, let's
16 at least talk about the defense notices. The court did receive a
17 notice from the defense that the defense would not be moving to
18 compel; is that correct?

19 CDC[MR. COOMBS]: That is correct, Your Honor.

20 MJ: And that would be compel speedy trial witnesses?

21 CDC[MR. COOMBS]: That is correct, Your Honor; and based upon
22 that and a previous agreement, we would then go to a particular
23 calendar, Calendar B, as opposed to a Calendar A, Your Honor.

1 MJ: All right, and for the record, at the last session we had
2 created a definitive calendar through the 5th through the 8th of
3 February session, and then following that, we had developed an "A"
4 and a "B" calendar, depending on what had been filed and whether the
5 defense was going to make a motion to compel. Based on that lack of
6 a defense motion to compel, we are now triggering over to the "B"
7 calendar. The next session is going to be the 16th and 17th of
8 January of this year and that will be primarily for argument on the
9 speedy trial motion and that will be followed by the next session on
10 the 5th through the 8th of February and the court will announce
11 follow-on sessions after meeting with the counsel just to make sure
12 that the "B" calendar is the accurate way forward. There may be some
13 additional things that need to be plugged in there as the proceedings
14 go on today; but before we recess these proceedings this week, we'll
15 have a final calendar for the remainder of the sessions.

16 Let the record reflect Major Fein has returned.

17 Mr. Coombs, is there anything else on the defense notices?

18 CDC[MR. COOMBS]: No, Your Honor.

19 MJ: All right, I believe there was an additional 505(h) notice;
20 is that correct?

21 CDC[MR. COOMBS]: There was, Your Honor. As far as -- yes,
22 505(h), we filed a notice on 14 December and additionally we filed
23 responses to the government's 505(h) replies.

1 MJ: All right.

2 Major Fein, are you prepared to address for the record what
3 notices have been filed by the government since the last session?

4 TC[MAJ FEIN]: Yes, ma'am.

5 Your Honor, on 12 December 2012, what has been marked as
6 Appellate Exhibit 449, the government filed a response to defense
7 interrogatories for OCAs via SIPRNET. Also what has been marked as
8 Appellate Exhibit 448 is the same filing but the unclassified
9 redacted version; and in that filing there are five enclosures, and
10 those five enclosures are the different -- [cleared throat] excuse
11 me, Your Honor -- are the different organizations and their responses
12 per organization.

13 Your Honor, on the same day, 12 December 2012, what has
14 been marked as Appellate Exhibit 446, the government filed a
15 disclosure of *Giglio* material to the court and defense. On the same
16 day, what has been marked as Appellate Exhibit 447, the government
17 disclosed or made available for inspection any R.C.M. 914 *Jencks*
18 material.

19 MJ: Was there an additional government motion to -- for leave
20 to -- until 10 January 2013 to submit a plan for storing appellate
21 exhibits not accompanying the record of trial?

22 TC[MAJ FEIN]: Yes, ma'am, there was. And, ma'am, that was on
23 18 December 2012, the government filed a motion -- excuse me, what's

1 been marked as Appellate Exhibit 452, government motion for leave
2 until this Thursday, 10 January 2013, to brief the court on the
3 government's plan to store any appellate exhibits or enclosures to
4 any appellate exhibit that required special handling; and that was
5 filed on the 18th of December, Your Honor.

6 Does the court want -- rather go into the court's ruling or
7 to continue?

8 MJ: No. There court -- there was no defense objection to that
9 request, so on the 18th of December, the court ruled in favor of the
10 prosecution, granting that request for delay. That is Appellate
11 Exhibit ----

12 TC[MAJ FEIN]: 463, Your Honor.

13 MJ: All right, I have it here as four hundred and -- that's not
14 the right ruling. That's the 26 October 2012 ruling. It should be
15 the 18 December 2012 ruling that I gave someone to copy.

16 [Pause]

17 MJ: We'll correct that on the break. It's -- the ruling should
18 be dated 18 December, if -- we'll make sure the record's supplemented
19 with that ruling on the next recess.

20 TC[MAJ FEIN]: Yes, ma'am.

21 [Pause] May I have a moment, Your Honor?

22 MJ: Yes.

23 [The military judge conferred with the court reporter.]

1 MJ: Yes, Major Fein.

2 TC[MAJ FEIN]: And, ma'am, the only other -- and this might have
3 occurred while I was -- while I was getting water, also on 11
4 December 2012, the court did issue an order for *Grunden*. It's been
5 marked as Appellate Exhibit 444.

6 MJ: All right, may I have that, Appellate Exhibit 444, please.
7 [AE 444 was handed to the military judge.]

8 MJ: All right, the court's order is as follows: Scheduling
9 order: 39(a) Session on Closure, dated 11 December 2012.

10 1. The current court calendar, dated 2 December 2012, has
11 alternate dates for two Article 39(a) sessions to determine whether
12 and to what extent the accused's trial should be closed to the public
13 for the protection of classified information. The actual dates for
14 the hearing will be determined based upon whether the defense files a
15 motion to compel witnesses for the motion to dismiss for a violation
16 of speedy trial and if the court grants such a motion in whole or in
17 part. The alternate dates are:

18 Government Classified Information: 5 through 8 February
19 2013 or 19 through 22 February 2013.

20 Defense Classified Information: 27 February through March
21 -- 1 March 2013 or 13 through 15 March 2013.

22 The Article 39(a) session for government classified
23 information will also determine:

1 a. the procedures for transition from open to closed
2 sessions;
3 b. who will be present for closed sessions;
4 c. procedures for handling military judge or member
5 questions that call for classified responses; and
6 d. procedures for handling military judge or member notes
7 regarding classified information.
8 2. By 10 January 2012 [sic] the government shall submit to
9 the court:
10 a. a list of all classified information for which the
11 government intends to request closed session. For each item of
12 information submitted, the government will indicate whether
13 declassification, redaction, substitutions, or other alternatives to
14 closure will allow for the presentation of that information in open
15 court. If declassification, redaction, substitution, or other
16 alternatives are not possible, the government shall indicate why the
17 declassification, substitution, or other alternative is not possible.
18 For all classified information where the government seeks to close
19 the court, in addition to declassification, redaction, and
20 substitution, the following alternatives to closure, at a minimum,
21 will be addressed: stipulations; use of code words or special names;
22 use of screens, disguises, and code names for classified witnesses;

1 electronic imagery visible only to cleared trial participants and not
2 the public; and the silent witness rule.

3 b. a proposed procedure for transitioning from open
4 sessions to closed sessions. At a minimum, the plan should address:

5 (1) the means of securing the entrances/exits to the
6 courtroom;

7 (2) the signage that will be posted indicating the court-
8 martial is in a closed session;

9 (3) the procedures for ensuring that electronic recording
10 and broadcasting equipment that is present during open sessions is
11 disabled during closed sessions of the court-martial; and

12 (4) the procedures for ensuring that classified portions of
13 trial are captured on separate court reporting equipment from non-
14 classified portions of trial;

15 (5) proposed procedures for handling military judge and/or
16 member questions that call for classified responses and for the
17 military judge or member notes.

18 c. Notice of whether the government objects to the defense
19 proposed use of classified information as detailed in its filing
20 dated 26 October 2012. If the government does not object to the
21 relevance and necessity of the information, the government shall
22 indicate whether declassification, substitutions, or other

1 alternatives to closure will allow for the presentation of that
2 information in open court.

3 d. Notice of whether the government will request that this
4 Article 39(a) session be *in camera* -- an *in camera* proceeding in
5 whole or in part pursuant to M.R.E. 505(i).

6 3. By 24 January 2012 [sic] the defense shall notify the
7 court:

8 a. Whether the defense objects to any of the proposed
9 closures in paragraph 2(a) of this order and the grounds for such
10 objections; and

11 b. Whether the defense objects to the procedures proposed
12 by the government in response to paragraph 2(b) of this order and any
13 declassification, substitution, or other alternative to closure
14 proposed by the government in paragraph 2(c) of this order.

15 So ordered this 11th day of December, 2012.

16 Now that is a good segue to discussing the R.C.M. 802
17 conference that I held with the parties. If everyone noticed, the
18 court got started a little bit late this morning. Part of that late
19 start was because of the Article -- or the R.C.M. 802 conference and
20 505(h) notice issues raised therein. I'd like the parties to briefly
21 summarize for the record what occurred during the R.C.M. 802
22 conference. I've asked -- in light of this issue, I've asked the
23 parties to confer and we're going to address that issue more

1 substantively tomorrow. I believe there was some government and
2 defense filings in relation to that issue as well.

3 Major Fein?

4 TC[MAJ FEIN]: Yes, ma'am. Ma'am, if it may please the court,
5 just after the court issued that order on 11 December 2012, the
6 government did submit an e-mail on 20 December 2012 seeking
7 clarification, asking if the court had for the purposes of the
8 *Grunden* filings in paragraph 2(c) if the court had intended that the
9 prosecution be able to -- would be required to provide notice of
10 whether the government objects to the defense's proposed use of
11 classified information as detailed in its filing just dated
12 26 October 2012 or did the court intend for it to be -- to include
13 26 October 2012 and all previous and subsequent filings. The court
14 e-mailed back saying all filings.

15 So moving into the filings that have occurred for the
16 505(h) that led to the R.C.M. 802, other than previous filings that
17 have already been put on the record, on the 14th of December, 2012,
18 defense submitted a 505(h) notice, what's been marked as Appellate
19 Exhibit 450. The government on the 21st of December, 2012, what has
20 been marked as Appellate Exhibit 454, had submitted a response to the
21 defense's 505(h) witness notice. On the same day, 21 December 2012,
22 what's been marked as Appellate Exhibit 455, the government provided
23 notice of a *Grunden* order issue, an issue the United States

1 identified based off the court's *Grunden* order; and then on 4 January
2 2013, the defense submitted a reply to the government's response to
3 the defense's 505(h) response, that's been marked as Appellate
4 Exhibit 457, and then on the same day, what has been marked as
5 Appellate Exhibit 458, the defense submitted a response to the
6 prosecution's notice of inability to comply with the *Grunden* order.

7 Your Honor, the government's position of -- during the
8 R.C.M. 802 is that the government requires more specificity under
9 M.R.E. 505(h) for the different notice that has been provided by the
10 defense and that specificity is needed in order to comply with the
11 court's *Grunden* order and more will be discussed, of course, tomorrow
12 morning when this issue is, I guess, litigated.

13 MJ: All right, and what was the appellate exhibit number for
14 the government notice of inability to comply?

15 TC[MAJ FEIN]: Yes, ma'am. The gov -- the appellate exhibit
16 number is Appellate Exhibit 455, dated 21 December 2012.

17 MJ: All right, thank you.

18 Defense, do you have anything to add?

19 ADC[MAJ HURLEY]: No, ma'am, other than to explain the position
20 of the defense briefly. First, the 14 December M.R.E. 505(h) notice
21 was a notice to use certain damage assessments in their entirety, and
22 we believe that submission is enough to get the government started in

1 getting that approval or disapproval determined by the original
2 classification authority.

3 Second, our ability to discuss with the witnesses in
4 particular what portions of that or any other classified documents is
5 limited by whether or not we knew that we were approved to talk to
6 these particular witnesses prior to trial about the -- those
7 classified matters; and like the government said, we'll talk about
8 this additionally tomorrow afternoon.

9 MJ: All right, and that's the reason I want the parties to
10 confer and narrow down whatever -- if you have certain clearances
11 approvals you just don't have them yet, the government to notify the
12 defense of that and then state with particularity exactly what you
13 need to further process these documents.

14 TC[MAJ FEIN]: Yes, ma'am.

15 ADC[MAJ HURLEY]: Yes, ma'am.

16 MJ: All right, at issue for this session ----

17 TC[MAJ FEIN]: Ma'am, I apologize. There's a few more
18 housekeeping ----

19 MJ: All right, proceed.

20 TC[MAJ FEIN]: The court issued a updated case calendar on the
21 20th of December of 2012, what's been marked as Appellate Exhibit
22 453, although as you've already stated, that calendar has already
23 changed; and the only other remaining are the actual motions and

1 responses which will be discussed during the actual motions -- or
2 that litigation of those.

3 MJ: All right. The motions that we have at issue for this
4 session are two motions to preclude evidence by the government, and
5 that's evidence of motive and then evidence of over classification.
6 Those two motions will be addressed today; then following that we
7 have three motions for judicial notice, one from the government; two
8 from the defense, for a variety of things. The defense's are for
9 judicial notice of the damage assessments.

10 Now just for my edification, Defense, is that judicial
11 notice that they exist or judicial notice for the substantive
12 information in them?

13 ADC[MAJ HURLEY]: The substantive information in them, ma'am.

14 MJ: Okay.

15 And [conferred with the court reporter] -- all right, I'm
16 understanding from the court reporter that the defense microphone is
17 not picking up, so the court reporter is not hearing what the defense
18 says.

19 COURT REPORTER: I'm hearing it; it's just very faint.

20 MJ: All right, well since we're having a verbatim record of
21 trial, I'd rather you didn't hear very faintly.

22 ADC[MAJ HURLEY]: Well, ma'am, we'll go to the podium. We'll
23 talk from the podium.

1 MJ: Well, let's do this. Why don't we take a brief recess;
2 let's see if we can fix this and we'll proceed at that point.

3 Court is in recess.

4 [The Article 39(a) session recessed at 1043, 8 January 2013.]

5 [The Article 39(a) session was called to order at 1103, 8 January
6 2013.]

7 MJ: This Article 39(a) session is called to order. Let the
8 record reflect all parties present when the court last recessed are
9 again present in court.

10 Has the audio been fixed?

11 TC[MAJ FEIN]: Yes, Your Honor.

12 MJ: All right.

13 All right, I believe we were discussing the M.R.E. 505(h)
14 notice, is that correct, or have we moved on?

15 ADC[MAJ HURLEY]: Ma'am, we've moved on to a discussion with
16 judicial notice ----

17 MJ: Okay.

18 ADC[MAJ HURLEY]: ---- with Captain Tooman.

19 MJ: Okay. So judicial notice we were talking about, then, the
20 -- I had asked the defense if you were -- were looking for me to
21 judicially notice everything in the actual damage assessments rather
22 than ----

23 ADC[MAJ HURLEY]: Or just its existence.

1 MJ: ---- the existence of the damage assessments, all right.

2 Is there anything further we need to address before we
3 proceed to what will be litigated today and tomorrow?

4 TC[MAJ FEIN]: No, ma'am.

5 ADC[MAJ HURLEY]: No, Your Honor.

6 MJ: All right, in the R.C.M. 802 conference I held with the
7 parties, we discussed the issues that will be litigated during this
8 Article 39(a) session. The parties and the court agreed that we
9 would discuss the prosecution's motion to preclude motive evidence
10 first, followed by the prosecution's motion to preclude over
11 classification evidence. Depending on how far we get with that,
12 we'll look at when we're going to take lunch; and the court is also
13 prepared to issue its Article 13 ruling today, which the court will
14 do after lunch. And then tomorrow, we will address the M.R.E. 505(h)
15 issue, followed by the three judicial notice motions, and then
16 finishing up with the defense motion to compel witnesses. I don't
17 know if we'll get through all of that tomorrow. If we do, we may end
18 tomorrow. If we don't, we've got the court scheduled to go through
19 Thursday and Friday.

20 Does either side desire to supplement anything I've said?

21 ADC[MAJ HURLEY]: No, Your Honor.

22 TC[MAJ FEIN]: No, Your Honor.

1 MJ: All right, is the government ready to argue its motion to
2 preclude evidence of motive?

3 ATC[CPT OVERGAARD]: Yes, ma'am. And the government motion is
4 Appellate Exhibit 394 and the defense response is Appellate Exhibit
5 429.

6 Ma'am, the United States submitted the motion *in limine* to
7 preclude the defense from raising evidence of motive in just the
8 merits portion of the trial in order to exclude irrelevant evidence
9 and to increase the efficiency of the proceedings.

10 Now throughout the pretrial proceedings so far, the defense
11 has raised motive to attempt to excuse the accused's misconduct, and
12 in their written motion, they point specifically to motive evidence
13 as being relevant to Article 104 to the Charge II, Specification 1,
14 and to the 641 charges. Specifically, the defense has contended that
15 evidence that suggests that the accused's motivation was something
16 other than to deal with an enemy would tend to make a fact of
17 consequence, for example, his guilty knowledge, less probable. The
18 defense has also contended that the same logic applies to every
19 charged offense that requires guilty knowledge.

20 Now the accused's motive for his intentional actions,
21 however, is irrelevant to the charged misconduct in this case because
22 evidence that he was motivated, for example, by wanting information
23 to be free does not have any impact on whether or not he had the

1 requisite intent, that is to say, that he knew what he was doing when
2 he transmitted the classified information to persons who were not
3 authorized to receive it.

4 A person need only have the requisite intent ----

5 MJ: Now let's go -- let's go through each of these
6 specifications here that the defense claims motive ----

7 ATC[CPT OVERGAARD]: Yes, ma'am.

8 MJ: ---- is relevant. Let's start with the aiding the enemy
9 knowledge.

10 ATC[CPT OVERGAARD]: The defense in their motion point
11 specifically to the court's requirement in your instructions, ma'am,
12 of general evil intent, and your instructions are Appellate Exhibit
13 -- let me see [pause to locate appellate exhibit number] -- 410, I
14 believe; yes, ma'am, Appellate Exhibit 410. And in your
15 instructions, the general evil intent simply refers to the
16 requirement for the United States to prove that the accused knew that
17 he was dealing directly or indirectly with an enemy of the United
18 States, so there's no bad faith motive in that, so no alleged good
19 faith or motive would be relevant to whether the accused knowingly
20 gave intelligence to the enemy.

21 MJ: What's the government's position -- well, go ahead. I'll
22 let you finish your argument.

1 ATC[CPT OVERGAARD]: Okay. I was going to continue on to the
2 Specification 1 of Charge II.

3 MJ: Well before you do that, the -- I understand the
4 government's position and the case law is that, well, that aiding the
5 enemy, it requires a knowing *mens rea*, and the knowledge is the --
6 does the government -- is it the government's position that the
7 knowledge required is that the accused knew that he was dealing with
8 the enemy?

9 ATC[CPT OVERGAARD]: Yes, ma'am. According to your
10 instructions, the accused had to know that he was dealing either
11 directly or indirectly with an enemy of the United States.

12 MJ: Does evidence of intensity of motive or singular focus on
13 motive have any bearing towards the knowledge prong?

14 ATC[CPT OVERGAARD]: Evidence of the intensity of the motive?
15 So -- I mean the gov -- Is there -- is there an example, ma'am?

16 MJ: [No response.]

17 ATC[CPT OVERGAARD]: So if ----

18 MJ: I'm thinking so much about what I want to do with this
19 information that the enemy never crossed my mind.

20 ATC[CPT OVERGAARD]: The government would contend that that
21 would not be evidence of the accused's intent. If there was evidence
22 that somehow negated the accused's intent, that would obviously be
23 admissible, but an example of -- I mean there's an extinction --

1 there's a distinction between motive and intent, so the motive is
2 what prompts a person to do the act and the intent refers to the
3 state of mind in which the act is done; so the government would --
4 the government would always concede that if there is any evidence
5 that goes towards negating the accused's state of mind when he was
6 doing the act, negating his requisite intent that he had to commit
7 the act, that that would be relevant, but evidence showing just what
8 motivated the accused to act wouldn't in any way negate his intent
9 because he still had the requisite intent that he needed to have in
10 order to commit the act. So just because, you know, the examples
11 that are given are like in -- in *Huet Vaughn*; just because an accused
12 didn't think that the order was, you know, correct or in line with
13 something she believed in doesn't mean that that's any relevance on
14 why she committed the misconduct, which was to desert her unit; or
15 the classic example is if somebody stole a loaf of bread to feed
16 their family, I mean, that person still stole the loaf of bread, even
17 though it was for a good motive.

18 MJ: Does the government have any cases that deal with
19 knowledge? I mean these are all intent, you know, intent, and I
20 understand the distinction between intent and a motive. The fact
21 that you had a laudable motive doesn't negate the fact that you, as
22 you said, if you intend to feed your family, you have a noble motive
23 but you still intended to steal the bread.

1 ATC[CPT OVERGAARD]: Yes, ma'am.

2 MJ: So the motive isn't relevant to the intent.

3 Are there any cases that the government's aware of
4 involving knowledge and motive?

5 ATC[CPT OVERGAARD]: Well the knowledge -- I mean the knowledge
6 would go towards the intent in ----

7 MJ: Well that's the *mens rea*.

8 ATC[CPT OVERGAARD]: Yes, ma'am.

9 MJ: But in aiding the enemy, the required intent is the accused
10 has to know he's dealing with the enemy. He doesn't necessarily have
11 to have a specific intent to deal with the enemy.

12 ATC[CPT OVERGAARD]: Yes, ma'am. But evidence that the accused
13 -- I mean the government's contention is that the intent in that case
14 would be the knowledge; that the government would have to prove that
15 he knew and the government would have to prove the state of -- or any
16 evidence that would go towards the state of denying of that knowledge
17 would be relevant. But, again, any evidence showing that there was a
18 different motive wouldn't go towards whether or not he knew what he
19 was doing.

20 MJ: Okay.

21 ATC[CPT OVERGAARD]: So, again, the government has tried to
22 distinguish -- draw a line between motive and intent and -- in their
23 motion, which as we said an easy way to think of it is that the

1 motive is what prompts a person to act and the intent refers to the
2 state of mind in which the act was done.

3 MJ: Let me go back again to my original question, ----

4 ATC[CPT OVERGAARD]: Yes, ma'am.

5 MJ: ---- because I'm also looking at the *McGinnis* -- or the
6 early *McGinnis* case on the 793 -- I believe that was 793(e). Well
7 the defense hasn't -- the defense hasn't moved to admit motive
8 evidence for the 793(e) offenses if I'm understanding the defense
9 motion correctly.

10 ATC[CPT OVERGAARD]: That wasn't part of the defense motion; no,
11 ma'am.

12 MJ: No, so I'm looking at *Olson* and the old cases dealing with
13 *Batchelor* -- the old cases addressing the Article 104 offense. Now
14 in all of -- in the old cases, the -- as I understand them, please
15 correct me if I'm mistaken, the issue of whether the accused knew he
16 was dealing with the enemy wasn't really at issue. I think he was
17 actually either talking to the enemy or doing some kind of direct
18 means versus the indirect means at issue here. So these -- the
19 motive in those cases really didn't go to the knowledge prong, did
20 it?

21 ATC[CPT OVERGAARD]: I believe both *Batchelor* and -- can I have
22 a second?

23 MJ: Yes.

1 [The assistant trial counsel and the trial counsel conferred.]

2 ATC[CPT OVERGAARD]: Ma'am, I think -- I think the *Batchelor*
3 cases and those line of cases are communication cases, but there are
4 other even older cases, and I don't have the citations, ma'am, but --
5 that talk about publishing information in a newspaper and that's an
6 indirect way to convey information to the enemy. The government
7 could ----

8 MJ: Well the court would appreciate those cases coming before
9 the court.

10 ATC[CPT OVERGAARD]: Yes, ma'am.

11 So to continue with Charge II, Specification 1, ma'am?

12 MJ: Yes.

13 ATC[CPT OVERGAARD]: Good faith or other motive evidence does
14 not negate the intent in that specification either; that the accused
15 wrongfully and wantonly caused the information to be published on the
16 Internet with knowledge that it would be accessible to the enemy,
17 because, again, the knowledge requirement in this charge requires
18 that the accused had to have actually known that the intelligence
19 published on the Internet was accessible to the enemy. The
20 motivation behind the accused's knowing act is not relevant to
21 whether or not he knew what he was doing. That information would
22 come in based on his training and experience of his MOS as an intel
23 analyst.

1 And finally good faith or other motive evidence does not
2 negate the intent of the 641 charges; that the accused knowingly and
3 willfully stole, purloined, or converted a thing of value to the U.S.
4 There the act was done -- the act must be done knowingly for the
5 purpose of the -- for that charge, I'm sorry, ma'am, the act is done
6 knowingly if it's done voluntarily and intentionally. So, again, the
7 motivation behind the accused's willful and knowing act does not
8 negate that he knew he was stealing, purloining, or knowingly
9 converting information that belonged to the U.S..

10 For all these charges, the argument is ultimately the same.
11 Even if the accused released classified information, for example,
12 because he thought the information should be free, it does not change
13 the fact that he willfully committed the misconduct and that he knew
14 the consequences of his actions; in this case that that information
15 would, in fact, go to the enemy. And in our motion, the United
16 States ----

17 MJ: So are you back to Specification 1 of Charge II?

18 ATC[CPT OVERGAARD]: Yes, ma'am.

19 MJ: Okay.

20 ATC[CPT OVERGAARD]: Yes, ma'am.

21 In our motion, the United States specifically cites as
22 examples of inadmissible motive evidence proffers of testimony by the
23 defense of their witnesses, and the first one is the defense calling

1 Adrian Lamo to say that the accused believed information belongs in
2 the public domain and that information should be free. The
3 government contends that this is clearly motive evidence because it
4 shows why the accused did what he did, what prompted him to do what
5 he did, versus intent, which is the state of mind from which he did
6 the act.

7 MJ: So my understanding here, the government is not going to be
8 offering any evidence from Adrian Lamo or Zachary Antolak about this
9 information belonging in the public domain and should be free.

10 ATC[CPT OVERGAARD]: That's correct, ma'am. The government
11 contends that information is valid on sentencing and not on the
12 merits portion.

13 MJ: All right, so the government's not offering motive evidence
14 to prove intent.

15 ATC[CPT OVERGAARD]: No, ma'am.

16 However, the other example the United States cited in its
17 motion was the statement by the individual who is actually formerly
18 known as Zachary Antolak. I believe you received from the defense
19 that Zachary Antolak has completed a legal name change to Lauren
20 McNamara. I think they filed that with you on 4 January, ma'am. So
21 upon further examination of the proffered testimony of Lauren
22 McNamara, the United States can conceive that at least one of the
23 statements made by the accused in the chat could potentially be

1 relevant to the accused's knowledge that he was dealing with the
2 enemy.

3 MJ: Which one?

4 ATC[CPT OVERGAARD]: That he was more concerned about making
5 sure that everyone, Soldiers, Marines, contractors, and even local
6 nationals, would get home to their families safely. The government,
7 however, does not believe this is motive evidence. We think it could
8 possibly be relevant to the accused's state of mind or his intent
9 when committing the charged misconduct.

10 MJ: Well state -- his state of mind in committing the charged
11 misconduct, isn't that motive or at least ----

12 ATC[CPT OVERGAARD]: No, ma'am. The government contends that
13 state of mind is intent. The state of mind that one has when
14 committing the misconduct is part of their intent to commit the act,
15 whereas the motive is what motivates a person, what prompts -- what
16 prompts them to actually commit the act.

17 MJ: Okay.

18 ATC[CPT OVERGAARD]: And this is why the United States also
19 withdrew its objection to the production of Lauren McNamara for the
20 merits portion of the trial.

21 MJ: All right, did the government do that formally; is that
22 part of your ----

23 ATC[CPT OVERGAARD]: Yes, ma'am, we did.

1 MJ: ---- okay.

2 ATC[CPT OVERGAARD]: That was part of our response to the
3 defense ----

4 MJ: Okay.

5 ATC[CPT OVERGAARD]: ---- motion to compel.

6 MJ: Okay.

7 ATC[CPT OVERGAARD]: The defense also contends in their written
8 motion that the testimony of a government witness with respect to the
9 accused's intent makes evidence of motivation proper rebuttal
10 evidence, and the defense is referring to what the court and the
11 parties had labeled as "act 2" as part of the 404(b) motion ----

12 MJ: All right.

13 ATC[CPT OVERGAARD]: ---- and that's the court's ruling in
14 Appellate Exhibit 2 ----

15 MJ: Uh-huh, I know what you're talking about.

16 ATC[CPT OVERGAARD]: ---- 287. Okay.

17 So without going into the details at all, the court found
18 that the act 2 evidence was relevant to the accused's state of mind,
19 which was relevant to prove that the accused knowingly gave
20 intelligence to the enemy for The Specification of Charge I and that
21 the accused recklessly and wantonly caused information to be
22 published on the Internet for Specification 1 of Charge II with
23 knowledge that the information would be accessible to the enemy and

1 that the accused willfully acted for the 793 and the 1030
2 specifications.

3 MJ: So it's the government's position that act 2, the testimony
4 from Jihrleah Showman, is not evidence -- well, let me ask this:
5 Would the government agree or disagree with this proposition does
6 motive evidence show why someone did something?

7 ATC[CPT OVERGAARD]: [Pause] Yes, ma'am, it can.

8 MJ: So the testimony of Ms. Showman with respect to act 2, does
9 that show why or does that show -- is that evidence of intent or
10 motive or both?

11 ATC[CPT OVERGAARD]: It's evidence of the state of mind, ma'am,
12 which the government contends is the intent; that he had the
13 requisite intent required to commit that misconduct and that is
14 evidence of his intent, that he had the proper state of mind.

15 MJ: Does the government have any case law that says that state
16 of mind is only relevant to -- is only part of intent and not part of
17 motive?

18 ATC[CPT OVERGAARD]: The government would have to look and get
19 back to the court, ma'am.

20 MJ: All right.

21 ATC[CPT OVERGAARD]: [Pause] And just to rebut the defense's
22 argument, I stated evidence of the accused's motive, for example,
23 that he committed misconduct because he thought information should be

1 free would in no way rebut the accused's intent or state of mind as
2 the act 2 statement supported when he made that act 2 statement. So,
3 again, it may show what prompted the accused to commit his crime but
4 it does not indicate the state of mind from which the act was
5 actually done. Therefore, the government contends that no motive
6 evidence should be admissible during the merits portion of the trial.

7 MJ: All right, thank you.

8 Mr. Coombs.

9 CDC[MR. COOMBS]: Yes, Your Honor.

10 First, Your Honor, the government does not understand the
11 defense's intended use of the motivation evidence of PFC Manning. We
12 would agree that if motive evidence was used to excuse conduct or in
13 some way to say he acted in good faith, that that may be more
14 appropriate and probably would be more appropriate for sentencing as
15 opposed for the merits, but the defense argues that this evidence,
16 motive evidence as to why he selected certain information is relevant
17 for three main reasons. And the court indicated, first, that we
18 weren't saying it was relevant for the 793 offenses, and while that
19 was not in the mode of response, it was in our witness list
20 notification as to why we're calling certain witnesses.

21 MJ: So the defense is planning on using motive evidence for
22 793.

23 CDC[MR. COOMBS]: Yes, Your Honor, and ----

1 MJ: How is that square with *Diaz*?

2 CDC[MR. COOMBS]: Well it goes with *Diaz* in that both for the
3 793 and the 1030 offenses, there is a requirement to prove that he
4 had a reason to believe that the information could be used to the
5 injury of the United States or to the advantage of any foreign
6 nation.

7 MJ: And how is his motive relevant to that?

8 CDC[MR. COOMBS]: Well reason to believe requires that the
9 government must prove that PFC Manning knew facts that either he --
10 from that either he knew or reasonably should have known that the
11 information could be used ----

12 MJ: Well where do we get "knew or reasonably should have known
13 that"? It's "reasonably should have known."

14 CDC[MR. COOMBS]: Knew or reasonably should have known.

15 MJ: Reasonably should have known.

16 CDC[MR. COOMBS]: Yes, Your Honor.

17 MJ: Okay.

18 CDC[MR. COOMBS]: Yeah, so he has to have subjective intent or
19 he objectively should have known. This is at least from Appellate
20 Exhibit 410, the court's instructions of either he ----

21 MJ: I believe the court's instructions say "reasonably should
22 have known."

23 CDC[MR. COOMBS]: No, I agree with that, ----

1 MJ: Okay.

2 CDC[MR. COOMBS]: ---- Your Honor. Either he knew or reasonably
3 should have known.

4 MJ: Knew or reasonably should have known; strike "knew";
5 reasonably should have known.

6 CDC[MR. COOMBS]: Okay, Your Honor; okay.

7 So from that, the government could meet its burden by
8 showing that he knew the information was used for the prohibited
9 purposes or that he reasonably should have known that the information
10 was used for the prohibited purposes.

11 MJ: Okay.

12 CDC[MR. COOMBS]: And before I get into that argument, I just
13 want to lay out the two other reasons why we would say it's relevant.
14 So for the first, again, as it relates to the reason to believe
15 information could be used to the injury of the United States or to
16 the advantage of a foreign nation, that would apply for both the 793
17 offenses and for the 1030 offenses.

18 MJ: Mr. Coombs, may I ask you a question? Why isn't any of
19 that in your response?

20 CDC[MR. COOMBS]: Well, Your Honor, that's laid out in, again,
21 our request for the witnesses; and then our response, it instead of
22 reiterating the argument for the relevancy, it says look to our

1 request for witnesses, and our request for witnesses lays out why

2 ----

3 MJ: And where does it say that?

4 CDC[MR. COOMBS]: Within the motion, Your Honor.

5 MJ: [Reviewed exhibit] Well it says, "Likewise, the defense
6 intends to call Zachary Antolak to discuss those matters described"
7 -- all right.

8 CDC[MR. COOMBS]: I don't mean to throw a wrench in this. I
9 think if you allow me to go through the argument you'll see the
10 defense's position, and it does comport with *Diaz* and the guidance
11 ----

12 MJ: Okay, yeah, now I'm certainly going to allow you to do your
13 argument, but I would ask both sides if you're going to make
14 arguments to me it's helpful that I have them in advance without, you
15 know, find it over here somewhere, okay, so just please do that.

16 CDC[MR. COOMBS]: Yes, Your Honor.

17 MJ: Okay.

18 CDC[MR. COOMBS]: Again, I apologize. It was not my intent to -
19 ---

20 MJ: Okay.

21 CDC[MR. COOMBS]: ---- play hide the ball with the court.

1 So, first, again, going towards a reason to believe and
2 that would apply to both the 793(echo) and to the 1030(a)(1)
3 offenses.

4 Second, as it relates to whether he had the requisite *mens*
5 *rea* requirement under Article 104, and I will discuss that both for
6 intelligence and for the general evil intent.

7 And, third, for rebuttal regarding Ms. Showman.

8 So reason to believe. Again, the government has to show
9 that he reasonably should have known that this information could be
10 used for the prohibited purposes, and undoubtedly the government in
11 their case in chief is going to offer evidence of PFC Manning's
12 training as a 35 Fox. They'll offer the fact that the -- some of the
13 information was marked as classified. Certainly they'll offer
14 information that much, if not all, of the information was pulled from
15 the SIPRNET, and from that they'll argue to the court that PFC
16 Manning knew that this could be used for the prohibited purposes or
17 they'll argue that he reasonably should have known that this could be
18 used for the prohibited purposes. And obviously they're entitled to
19 do that, as the government trying to prove its case, but if that is
20 true, then the opposite must be just as true. The defense must be
21 entitled to use PFC Manning's training, knowledge, and experience to
22 show that he selected information that he believed could not be used

1 to the harm of the United States or to the advantage of any foreign
2 nation.

3 MJ: Well how is that motive evidence? I mean what ----

4 CDC[MR. COOMBS]: Well that motive evidence is his motivation in
5 this instance and the way the defense reads the government's motion,
6 his motive to select information that he believed could not be used
7 for prohibited purposes, in other words, harm the United States or
8 aid any foreign nation, and that he believed should be public based
9 upon various reasons. In ----

10 MJ: Just let me -- let me just stop you there. So this
11 information, what -- this information on motive is information should
12 be free. What's the information we're talking about that the defense
13 would want to introduce?

14 CDC[MR. COOMBS]: Well that's how the government has couched
15 that, "information should be free." The motive in this instance that
16 the defense would be presenting is PFC Manning's motive to select
17 information that he believed could not be used to the harm of the
18 United States; that also comes out through the testimony of Adrian
19 Lamo and their chats of him saying, you know, if this information's
20 out in the open it can't be used to the harm; and it really kind of
21 follows a logical train of thought. If it's going to be out in the
22 open and everyone knows it and it's selected information that he
23 believed would -- was either overclassified, and we'll talk about

1 that for a separate motion, or he believed could not be used to the
2 harm of the United States, then once it's out in the open, obviously
3 at that point everyone knows it so it's not information that's going
4 to aid the enemy, it's not information that is going to harm the
5 United States because it is out in the open. So his -- the
6 government has tried to couch his motive as a information-should-be-
7 free motive but that is not, you know, the limit -- the sole
8 limitation of his motive here.

9 MJ: The information of the motive, as I understand from the
10 defense, the defense wants to use it through the chats with Mr. Lamo;
11 is that ----

12 CDC[MR. COOMBS]: That's part of it, and then as we, you know, -
13 ---

14 MJ: Do I have those chats to look at to see what you're talking
15 about?

16 CDC[MR. COOMBS]: No, Your Honor, and in many cases, this motion
17 by the government, again, is better served at the time when the court
18 actually has the benefit of seeing the government's case as they
19 present it and then as we present our case and make a determination
20 at that point whether or not the information is relevant. The
21 government is seeking it in advance to preclude an entire area of the
22 defense and we're left in a position now of not just litigating this
23 issue but then trying to basically put our defense's case in chief on

1 during this motions hearing. It's untimely in order to file the
2 motion at this point because the court doesn't have all the
3 information that it would need; but if the court just looks at the
4 fact that the government does have to prove that he reasonably should
5 have known and this does kind of dovetail with another ruling of the
6 court with regards to the damage assessments. If information comes
7 out through witnesses that PFC Manning selected information that he
8 believed could not be used for the prohibited purposes, then his
9 subjective belief at that point of why he selected certain things,
10 again, I selected this information because I didn't believe it could
11 cause harm. I didn't select this information because I knew this
12 would cause harm, that subjective belief becomes relevant if it's
13 objectively reason ----

14 MJ: Is that the information in the chat? I mean, what's the
15 problem with me seeing what's already out there for purposes of
16 deciding this motion?

17 CDC[MR. COOMBS]: Well because some of that information is not
18 just going to be coming from Adrian Lamo. [Pause] And if you look at
19 the fact that if the -- if the defense's position that we elicit
20 through witness' testimony is that he selected information that could
21 not be used to the harm of the United States, that was his motive,
22 his subjective motive, and he believed that he did that, then the
23 term -- determination for the 793 offenses and the 1030 offenses

1 turns on whether or not that was objectively reasonable; and as the
2 court has previously held, then that would make evidence of the
3 actual harm, as documented in the damage assessments, relevant in the
4 merits portion to corroborate whether or not his belief, his
5 subjective held belief was, in fact, reasonable; and so the defense's
6 position here is this is very similar to *United States v. Miller*.
7 The cite for that is 874 Fed. 2nd 1255; it's a Ninth Circuit case.

8 MJ: Okay, what's the cite again? It's very helpful to have
9 these in advance, yes.

10 CDC[MR. COOMBS]: Yes, Your Honor; 874 Fed. 2nd 1255. There the
11 court said, "We are troubled by the instruction," referring to the
12 judge's instruction, "because it seems to misconceive the nature of
13 Miller's defense. Miller did not really contend that he was acting
14 within the scope of his duties, rather his defense was he was
15 deliberately -- he deliberately went outside the scope of what he was
16 authorized to do and that he did so in order to set up an operation
17 that he hoped would later meet with FBI approval; thus it would have
18 been more appropriate to instruct the jury to the effect of Miller's
19 reasonable belief, if any, that his actions would have met with
20 subsequent approval from his FBI superiors in order to -- that could
21 be taken into account in deciding whether he had a reason to believe
22 his actions would harm the United States or help a foreign nation."
23 In this case, it was the Soviet Union.

1 So much like in that instance, in the defense's case and
2 also in cross-examination of witnesses, we will elicit information
3 that goes to whether or not this information -- whether or not PFC
4 Manning reasonably should have known this information could cause
5 damage. If the motive evidence that we bring out, either through
6 Lamo and other witnesses, is that PFC Manning selected information
7 that he believed could not cause damage, then that subjective belief
8 is relevant and that motive evidence of my motive is to select
9 information that's not going to be prohibited -- used for prohibited
10 purposes is relevant ----

11 MJ: That's where I'm getting confused. How is that motive
12 evidence? That's intent evidence, isn't it?

13 CDC[MR. COOMBS]: Well, and I would argue that it is; it is
14 intent; it's what did you intend to do? The government argues that
15 that motive evi -- the evidence of intent of, hey, my intent is to
16 select information that could not be used to the harm of the United
17 States is the motive that he's trying to do, and so as we read their
18 motion, that is what they're trying to prohibit. Certainly from Lamo
19 when he talks about, you know, why don't you just sell this
20 information? Well, you know, this information should be out in the
21 public. If it's out in the public, it's for a greater good and it
22 can't do any harm is the essential testimony that may be coming from
23 Adrian Lamo. The government is seeking to prohibit that under an

1 idea that this is motive, and oftentimes motive and intent can exist
2 at the same time. Your motive can educate your intent as to why
3 you're doing things; and if the evidence was that, you know, that he
4 was -- we were trying to use this motive to excuse his conduct, that
5 would be a sentencing aspect of it, but we're not using it for that
6 purpose.

7 MJ: So if I'm understanding you, whether he had reason to
8 believe is an objective question; it's not whether he believed it or
9 not, so ----

10 CDC[MR. COOMBS]: No, it's totally -- correct. So the objective
11 question is the ultimate determination. If the evidence that you
12 offer is it his subjective belief and whether or not his subjective
13 belief was reasonable from an objective standpoint then comes in --
14 that's how you would then look at the other evidence, to include the
15 damage assessments.

16 MJ: So you're saying reason to believe has an affirmative
17 mistake of fact offense is what you're saying.

18 CDC[MR. COOMBS]: Well it would if what you raised -- if you
19 believe subjectively that it could not cause damage and objectively
20 that was reasonable, then that is a defense. So the question then
21 becomes almost a failure of ----

22 MJ: How is that a specific -- how is reason to believe a
23 specific intent?

1 CDC[MR. COOMBS]: I'm not saying ----
2 MJ: Or ----
3 CDC[MR. COOMBS]: ---- that it is, Your Honor.
4 MJ: So you use honest and reasonable ----
5 CDC[MR. COOMBS]: Exactly.
6 MJ: ---- mistake of fact as to the reason to believe.
7 CDC[MR. COOMBS]: Correct, Your Honor, and the issue here is the
8 government has that burden to prove that he reasonably should have
9 known, so this evidence, then, goes to whether or not the government
10 meets that burden, both for the 793 offenses and for the 1030.
11 MJ: Whoa, whoa, whoa, whoa. The mistake of fact -- okay, so if
12 the defense of mistake of fact is raised, that's something the
13 defense has to raise, right?
14 CDC[MR. COOMBS]: If you're using the mistake of fact defense,
15 but the government apart from the mistake of fact defense has the
16 obligation under its burden for these offenses to prove that PFC
17 Manning reasonably should have known that this information could be
18 used to the harm of the United States or to the advantage of a
19 foreign nation; that is their requirement. So ----
20 MJ: So ----
21 CDC[MR. COOMBS]: ---- when you look at that requirement, our
22 evidence that we're offering negates the government's, you know,
23 burden of proof or it negates an element the government is intending

1 to prove; that could be used just solely for that, or if you wanted
2 to raise a mistake of fact defense, you could do so as well, but in
3 this instance we're offering this evidence under the government has
4 the burden to prove that PFC Manning reasonably should have known
5 that this information could be used for prohibited purposes.

6 MJ: So where's the subjective prong in that?

7 CDC[MR. COOMBS]: There isn't, and we're -- I'm not saying there
8 is. What I'm saying is what we're trying to offer is -- and what we
9 can offer it through witnesses is his subjective belief ----

10 MJ: That's what I just asked you. Why is that relevant to an
11 objective test?

12 CDC[MR. COOMBS]: And I'm not -- I'll explain it. So you offer
13 -- I subjectively selected information that I believed could not be
14 used to the harm of the United States. Now whether or not that
15 subjective belief is reasonable then, as the court has said, if that
16 evidence comes out that he selected information he didn't believe
17 could be used to the harm of the United States, then you can look at
18 other information to see if that was objectively reasonable, because
19 that in and of itself wouldn't get you out of trouble, but if it was
20 objectively reasonable, then, yes, it would and that's why this
21 evidence is relevant because it sets up what is, in fact, then what
22 is the ultimate determination, was it objectively reasonable or not?

1 MJ: That's all very interesting, Mr. Coombs. Why don't I have
2 any of this in your response?

3 CDC[MR. COOMBS]: Well in this instance, the government when
4 they were saying they want to preclude motive evidence, again the
5 motion is untimely from the defense's position because the court's
6 not in a position to make a determination on that from a factual
7 standpoint. It's more appropriate when you actually get to the case
8 where you can see how the facts play out; but when we laid out both
9 in our mode of response, which was in this case a motion by the
10 government that although was on our calendar as far as motions in
11 *limine* wasn't detailed as to what their motions would be, but then
12 when you look at our proffer as to why we're trying to compel certain
13 witnesses, that lays out exactly what we're asking the witnesses to
14 testify to; and in this instance now, again just trying to respond to
15 the government's broad brush we want to keep out any motive evidence
16 that may -- and even they can't fully articulate the difference
17 between motive and intent and how sometimes motive may be, in fact,
18 relevant and not, they just simply want to eliminate that as a
19 possible defense. Well, in trying to respond to that, at least for
20 the 793 and 1030 offenses, the defense's position is that this
21 evidence could come out through witnesses to determine whether or not
22 he had the requisite intent or the government meets its burden under
23 the 793 offenses to show that he objectively should have known the

1 information could be used for prohibited purposes and that's why it's
2 relevant.

3 MJ: All right.

4 CDC[MR. COOMBS]: Now it's also relevant for actual knowledge
5 under the Article 104 offense. For there, the government has to
6 prove that PFC Manning knowingly gave intelligence to the enemy
7 through WikiLeaks. Now knowledge requires that he knew that he was
8 actually giving intelligence to the enemy through indirect means, and
9 the only indirect means so far that the government has presented in
10 its filings is through giving this to WikiLeaks. Now this offense
11 requires both that the information charged needs to be intelligence
12 and that PFC Manning had a general evil intent to deal directly with
13 the enemy; and they have to show that he had actual knowledge that he
14 was, in fact, dealing with the enemy. So his motive evidence when
15 you look at intelligence, the government has to prove under
16 intelligence that this information was helpful information to the
17 enemy, that's their burden, and PFC Manning's motive to select
18 information that he believed could not be used for prohibited
19 purposes is relevant evidence at this point. If he subjectively
20 believed that he selected information that could not be used to harm
21 the United States and that is determined by the court, the trier of
22 fact, that was objectively reasonable, then that goes -- that takes

1 away the idea that the information charged was intelligence as
2 required under Article 104.

3 MJ: Now how do we get an honest and reasonable mistake of fact
4 as to whether something is intelligence? It's either intelligence or
5 it's not.

6 CDC[MR. COOMBS]: Well the intelligence under the definition is
7 it has to be some information that is helpful to the enemy, and so
8 when you -- when you look at -- and it has to be true; and so when
9 you look at that, if you are selecting information that you believe
10 could not be used for prohibited purposes, in other words, could not
11 be used to harm the United States, then -- and also just the common
12 sense of the information that would be helpful to the enemy would be
13 information that is given directly to the enemy in a -- in a manner
14 and a fashion in which it's not discovered that information has been
15 provided to the enemy; and that's why every case that charges Article
16 104 deals with somebody who has gone directly to the enemy and
17 there's no doubt as to the intent and there's no doubt as to the plan
18 of having -- giving information to them and hoping that it would be
19 helpful to the enemy. This case is unprecedented in how the
20 government is trying to charge the 104 offense and we've litigated
21 that motion, but in this instance, then, whether or not if he -- if
22 his motive or his intent was to select information that could not be
23 used for prohibited purposes, in other words, to harm the United

1 States, that is some evidence as to whether or not this information
2 qualifies as intelligence under Article 104 and whether or not the
3 government meets its burden. It also is relevant to general evil
4 intent. The government must prove that Manning -- PFC Manning had a
5 general evil intent in that they have to prove that he knew he was
6 dealing with the enemy, either directly or indirectly, when he gave
7 information to WikiLeaks. In other words, you cannot, as the court
8 determined, violate Article 104 inadvertently, accidentally, or
9 negligently; and in this instance, the motive evidence or the intent
10 evidence of PFC Manning's select information that could not be used
11 for prohibited purposes helps to disprove the general evil intent in
12 this case of actually trying to convey information to the enemy.

13 MJ: Well, remember, this isn't a specific intent crime. I
14 mean, the general evil intent, you can't convert that to a specific
15 intent crime. I mean, the general evil intent is the knowledge it --
16 is the knowledge *mens rea*.

17 CDC[MR. COOMBS]: Right, and the knowledge *mens rea* there is
18 knowing that you're dealing indirectly or directly with the enemy.
19 If your -- if your motive is to select information that you believe
20 could not be used to the harm of the United States, that information
21 is relevant to the actual knowledge of dealing with the enemy,
22 because if someone is selecting information they don't believe could
23 be used to the harm of the United States, that undercuts any argument

1 that they were trying indirectly or directly to give information to
2 the enemy and so that undercuts the general evil intent that's a
3 requirement under the government to prove. Also, as the court
4 pointed out, you can have a situation and -- where your sole focus is
5 to provide information that you believe (1) could not be used to harm
6 the United States but should be made public for the greater good and
7 the enemy never factor into your equation; and, again, if that --
8 that's your motivation and that's the evidence -- that's the evidence
9 of intent, then that undercuts the general evil intent or the actual
10 knowledge requirement that the government must show in order to carry
11 its burden on the 104 offense.

12 In this situation also, if you were in a position in which
13 the trier of fact, the court, determined that this information was
14 intelligence, then it sets up the defense that you inadvertently,
15 accidentally, or negligently provided intelligence to the enemy if
16 your sole motive or sole intent was to provide information that you
17 believe could not be used to harm the United States and instead
18 should be information that's out in the general public. So in that
19 regard, it would impact either the general evil intent or the actual
20 knowledge requirement that the government must prove to carry its
21 burden or it would provide the defense of inadvertently,
22 accidentally, or negligently providing intelligence to the enemy if
23 that motive evidence or that intent evidence shows that what was

1 factored into your mind was never giving information to the enemy or
2 never using WikiLeaks as the conduit to get information to the enemy.

3 The cases that the government cites -- and the defense can
4 get you those -- or the government's referenced as far as using
5 newspapers, the defense had those in its motions and I can, after
6 today's hearing, give the court exact cites, but those cases dealt
7 with basically Civil War Era-type cases, where they dealt with using
8 newspapers in order to put in code information for the enemy, so
9 that's how you used newspapers indirectly to get information to the
10 enemy, you took out an ad that the enemy then could take the ad and
11 you each had a code chart and you could decipher from that ad what
12 the actual information was; that's the example of using newspapers.
13 There's been no case in the entire history of military jurisprudence
14 that dealt with just simply providing information to a legitimate
15 journalistic organization and then having them publish it and that
16 being held as aiding the enemy in and of itself. So the government
17 still has to show that actual knowledge that he was dealing with the
18 enemy or a general evil intent -- well actually and a general evil
19 intent to do so and this evidence goes directly to that.

20 Finally, this evidence also rebuts the evidence the
21 government intends to elicit from Ms. Showman. The government would
22 ask the court to listen to what they say is the 404(b) evidence that
23 shows state of mind. State of mind months previous to a deployment

1 and what the defense would argue and what we will show during the
2 case in chief was not a conversation about one's political beliefs or
3 one's desire to provide information to the enemy; but the
4 government's entitled to take that 404(b) evidence and argue the
5 value for what they think they can pull from it. But just as they're
6 entitled to do that, then we're entitled to rebut that, so when they
7 present that evidence of, hey, this is his true motivation, Your
8 Honor, based upon this one statement in a counseling session months
9 prior to the deployment, well, that is when we're entitled to offer
10 his true motivation in this case or his true intent as rebuttal in
11 order to select information that he believed could not be used to
12 harm the United States or to the advantage of any foreign nation.

13 Now, again, when the government filed this motion, it's
14 clear the goal is to basically cut out a whole level of defense, and
15 they were successful in that when they filed their motion to prohibit
16 actual harm, but even there the court said that if you have some
17 evidence to show the subject -- the subjective belief of PFC Manning
18 and that this evidence would corroborate that subjective belief, then
19 that actual damage information could be relevant, and this is how the
20 defense believes that this would come into play during the case in
21 chief.

22 Subject to your questions.

1 MJ: Yes. The defense has also said it's relevant to
2 Specifications 1, 4, 6, 8, and 12 of Charge II; how?

3 CDC[MR. COOMBS]: Well, with regards to the value of the
4 information, if, in fact -- excuse me, ma'am, sorry -- Specifications
5 1 -- 1, 4, 6, 8, and 12?

6 MJ: The wanton disclosure ----

7 CDC[MR. COOMBS]: Right.

8 MJ: ---- and all of the 641 offenses.

9 CDC[MR. COOMBS]: Right, so ----

10 MJ: I'm having a lot of trouble figuring out how it has any --
11 or any motive here has any relevance to knowledge in the 641
12 offenses.

13 CDC[MR. COOMBS]: Okay. So for the 641 offenses, if your motive
14 was to select information that you believe could not be used to the
15 harm of the United States ----

16 MJ: But what difference does it make what information you
17 select in a 641 offense?

18 CDC[MR. COOMBS]: Well, and the reason why that makes a
19 difference is the value determination, when you're valuing that
20 information, the government, you know, has provided some discovery on
21 their evaluation methods, but it's, you know, likely they'll try to
22 use the thieves' market, perhaps, in order to establish value or some
23 other determination as to how they could say what the information

1 charged in the 641 offenses was worth. If the information selected
2 could not be used to the harm of the United States and that's his
3 motive to select it and objectively that's reasonable and we're able
4 to use the damage assessments to show, in fact, that any damage was
5 speculative at best or is unrealized, it's more of a this could
6 happen but didn't happen, then that goes to the actual value of the
7 information.

8 MJ: Then why does the written motion say that it goes to the
9 knowledge prong?

10 CDC[MR. COOMBS]: Well, with regards to the knowledge prong,
11 then that would not be my argument, Your Honor.

12 MJ: So the argument -- so I can X out "knowledge" and put
13 "value"?

14 CDC[MR. COOMBS]: And on this, I decided to argue it because I'm
15 also carrying the day on our motions to compel. One moment and let
16 me confer with my co-counsel and then I can ----

17 MJ: Yes.

18 [The civilian defense counsel conferred with co-counsel.]

19 CDC[MR. COOMBS]: All right, after being educated by my co-
20 counsel, it goes to the knowingly converted, Your Honor, so the
21 knowingly converted information in order to convert you -- the
22 conversion requirements that the government's going to have to prove
23 that the item substantially interfered with the government interest,

1 if again it's an item that could not be used to the harm of the
2 United States, then that would go towards the knowingly convert
3 prong.

4 MJ: All right.

5 CDC[MR. COOMBS]: Now, with regards to the wanton, again, the -
6 - this would be less towards the willful aspect under Specification 1
7 of Charge II, but with regards to the wanton aspect, then certainly
8 if your intent is to select information that could not be used to
9 harm the United States, then that undercuts the idea that you acted
10 wantonly when you provided that information, in this case, to
11 WikiLeaks. So it would not undercut the willful aspect, but it would
12 undercut the wanton aspect, Your Honor.

13 MJ: All right.

14 CDC[MR. COOMBS]: Any other questions, Your Honor?

15 MJ: Nope.

16 CDC[MR. COOMBS]: And, Your Honor, I will get you the case
17 cites.

18 MJ: I appreciate that; thank you.

19 CDC[MR. COOMBS]: Yes, Your Honor.

20 ATC[CPT OVERGAARD]: Ma'am, the chat logs that you asked about
21 are actually part of the government response to speedy trial.

22 MJ: Okay, there's volumes and volumes and volumes of
23 information in this case.

1 ATC[CPT OVERGAARD]: Yes, ma'am.

2 MJ: If the parties want me to look at something, please,
3 please, please attach it to whatever it is that's the motion of the
4 day as opposed to having me rifle through boxes and try to find it
5 somewhere.

6 ATC[CPT OVERGAARD]: Yes, ma'am.

7 MJ: If it's already been introduced as an appellate exhibit,
8 Government, I'd appreciate a copy of it.

9 ATC[CPT OVERGAARD]: Yes, ma'am.

10 Subject to your questions, ma'am.

11 MJ: I have a couple. The defense -- it appears the parties
12 have a different view of what's motive. The government's -- let me
13 just focus on the defense's proffer that they are offering testimony
14 -- or they're going to present evidence that the accused made
15 conscientious choices on what to pick and what not to pick to take
16 under 641 and to disclose under 793(e).

17 Am I stating that accurately, Mr. Coombs?

18 CDC[MR. COOMBS]: Your Honor, yes, and also ----

19 MJ: Does the government ----

20 CDC[MR. COOMBS]: ---- 1030.

21 MJ: All right, and 1030(a)(1).

22 Does the government view that kind of evidence as motive
23 evidence?

1 ATC[CPT OVERGAARD]: No, ma'am. The government would view that
2 more as potentially evidence that could support an affirmative
3 mistake of fact defense, if ----

4 MJ: Okay.

5 ATC[CPT OVERGAARD]: ---- defense raises it.

6 MJ: [Pause] The defense has argued that the -- oh, what's the -
7 - what's the government's position with the defense argument with
8 respect to the reason to believe motive is relevant to the reason to
9 believe prong of the 793 and 1030(a)(1) offenses?

10 ATC[CPT OVERGAARD]: The reason to believe is an objective
11 standard, ma'am, so the government -- I mean, the government would
12 not call it motive evidence. The government does not think it would
13 be relevant in any way to the reason to believe.

14 MJ: Okay.

15 What about the intelligence, the relevance to intelligence,
16 whether something is or isn't intelligence?

17 ATC[CPT OVERGAARD]: Again, ma'am, the -- whether something is
18 or is not intelligence is there's no, I guess, the government does
19 not see any motive evidence involved in whether something's defined
20 as intelligence or not. So if the accused wants to -- or if the
21 defense wants to offer that the accused didn't intend to harm the
22 U.S. as -- I guess the government doesn't really understand how that

1 would be relevant to whether or not something is intelligence or not,
2 ma'am, since intelligence is, you know, a finite definition.

3 MJ: All right, and does the government have anything further to
4 offer with respect to state of mind, whether that's part of motive or
5 part of intent or both?

6 ATC[CPT OVERGAARD]: Well, I mean, in general, ma'am, the
7 government acknowledges that, I mean, motive can be circumstantial
8 evidence of intent or circumstantial evidence of state of mind, but
9 in this case, the government does not see how -- is arguing that
10 motive is not relevant to the charged offenses as to the offenses
11 actual -- as to the accused's actual requisite state of mind or his
12 actual requisite intent in these charges. The government's not
13 arguing that motive can never be relevant in any case, because as we
14 saw in Diaz, it can be relevant to, for example, a 133 charge,
15 because in a 133 charge, the government has to show that it was
16 dishonorable in all circumstances, so if an accused, for example, had
17 an honorable motive, that could be relevant to disproving a 133
18 charge, but in this case, there's no -- no requisite evil intent in
19 any of the charges. There's the knowledge is -- or the reason to
20 believe is an objective standard, so the government is just arguing
21 that motive isn't relevant to the charges in this case.

22 MJ: All right, thank you.

23 ATC[CPT OVERGAARD]: Yes, ma'am.

1 CDC[MR. COOMBS]: Ma'am, just briefly on the *Diaz* point. It's -
2 - I think it's important to see that in *Diaz* the defense was not
3 whether or not the information could be used for prohibited purposes,
4 that was not why *Diaz* was trying to offer his motive, and the court
5 talked about his knowledge and training and said clearly based upon
6 that and no -- obviously no evidence to the contrary, he had a reason
7 to believe that this information could be used for prohibited
8 purposes, and that's not our situation here. We're offering his
9 intent squarely on the issue of whether or not it was objectively
10 reasonable or not to know that this information could be used for
11 prohibited purposes.

12 MJ: All right.

13 Well it's 12 o'clock. Do the parties want to drive on or
14 do we want to break for lunch?

15 CDC[MR. COOMBS]: Your Honor, if we could break for lunch.

16 MJ: All right, Government?

17 TC[MAJ FEIN]: Break for lunch, Your Honor.

18 MJ: All right, and how long would you like?

19 TC[MAJ FEIN]: Till 1300, Your Honor.

20 CDC[MR. COOMBS]: Could we extend just to 1315, Your Honor?

21 MJ: Any objection?

22 TC[MAJ FEIN]: No, ma'am.

23 MJ: All right, court is in recess till 1315.

1 [The Article 39(a) session recessed at 1201, 8 January 2013.]

2 [The Article 39(a) session was called to order at 1323, 8 January
3 2013.]

4 MJ: This Article 39(a) session is called to order. Let the
5 record reflect all parties present when the court last recessed are
6 again present in court.

7 Are the parties ready to proceed with the motion to
8 preclude for overclassification?

9 CDC[MR. COOMBS]: Yes, Your Honor.

10 ATC[CPT OVERGAARD]: Yes, ma'am.

11 MJ: All right, Government?

12 ATC[CPT OVERGAARD]: The government's motion is Appellate
13 Exhibit 451, and the defense's motion is Appellate Exhibit 456.

14 [The assistant trial counsel was speaking away from the microphone.]

15 ATC[CPT OVERGAARD]: Can you hear me?

16 [The court reporter indicated an affirmative response.]

17 ATC[CPT OVERGAARD]: Your Honor, the United States requests that
18 the court preclude the defense from introducing relevant
19 overclassification evidence in both the merits and the sentencing
20 portions of the trial. Now the United States requests that the court
21 make this determination pretrial to avoid irrelevant issues and
22 irrelevant witnesses from being introduced at trial by an argument

1 that does not relate to any of the charged offenses or possible
2 defenses for misconduct.

3 Now we have -- the government has three main arguments
4 supporting the United States's motion *in limine*.

5 First, that general statements of overclassification have
6 no bearing on whether or not the documents charged were correctly
7 classified by the respective OCAs and classified at the time of the
8 alleged compromise.

9 Second, that general overclassification evidence is
10 irrelevant to whether or not the charged information could be used to
11 cause injury to the United States or damage to a foreign nation or
12 was closely held.

13 And, third, there is no evidence that the accused knew
14 about any alleged overclassification problem presented by the defense
15 at the time of the accused's misconduct and, therefore, it had no --
16 and, therefore, that it had any impact on the accused's intent and
17 that's if the mistake of fact defense is appropriate and raised by
18 the evidence.

19 The United States will explore each of these reasons
20 separately and respond to defense's written filing.

21 So first, ma'am, the general statements of
22 overclassification have no bearing on whether the documents charged
23 were correctly classified by the respective OCAs and classified at

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized. Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.